SUPREME COURT, U. S.
FILED
SEP 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73 550

TEXASGULF INC., *Petitioner*

v.

FEDERAL POWER COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texasgulf Inc.[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on June 28, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A, *infra,* pp. 1a-23a) is not yet reported.

[1] The name of Texas Gulf Sulphur Company (used in the pleadings in the Court below) has been changed to Texasgulf Inc.

The opinions and orders of the Federal Power Commission (R. 3429-3464, 3678-3686) are reported at 47 F.P.C. 245 and 1021.

JURISDICTION

An order of stay of the judgment was entered by the Court of Appeals on September 25, 1973 to afford opportunity for review of the June 28, 1973 opinion by this Court. The jurisdiction of this Court is involved under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether, in view of Section 1(c) of the Natural Gas Act, natural gas transmission systems serving intrastate markets near the coast should be deprived of their exemption from Federal Power Commission jurisdiction simply because the company owning the local system introduces gas into it from pipelines which it owns which, for economic, engineering and ecological reasons, are designed to bring natural gas to high ground from wells in the coastal marshes and offshore waters to serve both intrastate and interstate markets?

STATUTE INVOLVED

Section 1(c) of the Natural Gas Act, 68 Stat. 36, 15 U.S.C. 717(c), provides as follows:

> "(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities

used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation of a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."

STATEMENT

This case involves the jurisdictional status under Section 1(c) of the Natural Gas Act, of a portion of the pipeline system of United Gas Pipe Line Company (United) serving the City of New Orleans and an area south and southwest of that city with natural gas purchased by United from producers in gas fields in the coastal marshes of Louisiana and the adjacent offshore area (the "Green System-East").

United used the Green System-East to transport gas, which it purchased from producers in Louisiana fields, for sale at wholesale to public utilities and for direct sales to industrial [2] and public utility power plant customers. For over thirty years this part of United's pipeline system was employed solely in an intrastate business. Therefore, it was not subject to the jurisdiction of the Federal Power Commission.

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[2] Texasgulf purchases gas from United under a long-term firm contract for use in its Bully Camp Frasch Process mine located in the coastal marshes of Lafourche Parish, Louisiana. The mine is supplied by United from one of the pipelines in the Green System-East.

The Louisiana Public Service Commission regulated the resale rates of United on the Green System-East and the transportation of gas to local gas distribution systems.[3] In 1964, Article 6, Section 4 of the Louisiana Constitution which broadly states the powers of the Louisiana Commission was amended to provide that the Commission may not regulate United's direct sales to industries.[4]

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[3] See United Gas Pipe Line Co., 34 P.U.R. 3d 78 (1960), aff'd as modified, *United Gas Pipe Line Co. v. Louisiana Public Service Commission*, 241 La. 667, 130 So.2d 652 (1961). The powers of the Louisiana Public Service Commission are stated as follows (LSA-R.S. 45:301-302):

"301. The transportation or sale of natural gas by pipe lines to local distributing systems for resale is affected with a public interest and such pipe lines, appurtenances and facilities to the extent of such transportation or sales are public utilities subject to the jurisdiction of the Louisiana Public Service Commission.

"302. The Commission shall supervise, govern, regulate and control the transportation or sale of natural gas moving by pipe line to local distributing systems for reseale for the purpose of fixing and regulating the rates charged and the service furnished by such public utilities in connection with such transportation or sale.

"The power, authority and duties of the Commission shall affect and include all matters and things directly connected with, concerning and growing out of the service given or rendered by such pipe lines transporting or selling natural gas to local distributing systems for resale with respect to any such transportation or sales."

[4] See LSA-Const. Art. 6, § 4, which provides in pertinent part that "the Commission shall have no power or authority to supervise, govern, regulate, and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, or any other person engaging in such sale of natural gas."

Prior to adoption of this amendment, the Commission apparently recognized that it had limited jurisdiction over direct sales under Louisiana Revised Statutes of 1950, Title 45, § 301, *et seq.* See *United Gas Pipe Line Co.*, 34 P.U.R. 3d at 82.

Beginning in 1965, without the consent of the Federal Power Commission or the knowledge of its customers on the Green System-East, United began to supplement gas supplies on that system with gas purchased from producers in other coastal and adjacent offshore fields which United used as sources of gas for its interstate markets. As a consequence, some of the gas purchased from producers for ultimate consumption in the State of Louisiana through the Green System-East was (and is) transported from the wellhead for a relatively short distance in a commingled stream with gas going to United's interstate markets.

In the case of the particular pipeline of United serving Petitioner, the commingling of gas was accomplished by extending a gathering line located in the coastal marshes, which had served only the Green System-East, into shallow waters of the Gulf of Mexico within the three mile limit, tieing the old intrastate gathering line at an onshore point into United's pipeline carrying gas to the interstate market, and requiring the producers to build the gathering lines required to bring the gas from the offshore fields to the end of United's newly extended gathering line.

United could have constructed separate lines connecting its new gas sources to the Green System-East and to the interstate market. Instead, United simplified construction, reduced the number of gathering lines built, commingled gas supplies, economized on pipeline costs to be borne by consumers, and limited the ecological disturbances caused the particularly sensitive marshlands and adjacent shallow offshore areas by pipeline construction.

The Commission decisions below—In a decision rendered in January 1972, the Commission held that it acquired jurisdiction over this historically intrastate system at the moment that United first injected gas into it from United's pipelines carrying gas to interstate markets. The Commission declined to hold the Green System-East exempt from its jurisdiction under Section 1(c) of the Natural Gas Act because of an alleged failure to meet the qualifying conditions of that provision: service of United and its facilities are not subject to regulation by a State Commission because the Louisian Public Service Commission has no jurisdiction over United's direct industrial sales; and the gas is not received by United from another person within or at the boundary of the State because United's Green System-East is connected directly to United's interstate system, and there is no purchase from "another person" at the point where the gas passes from the interstate pipeline to the Green System-East.[5]

The Court decision below[6]—The Court of Appeals affirmed the Commission's finding that it had acquired jurisdiction due to the commingling of gas in the pipelines carrying gas to the interstate markets, and ruled that Section 1(c) did not exempt the Green System-East from Commission jurisdiction because "a facility

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[5] 47 F.P.C. at 261.

[6] In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 456 F.2d 326 (5th Cir. 1972), the Court of Appeals had held that the Commission had no jurisdiction over the Green System-East. This Court reversed on the ground that the Court of Appeals had erred in deciding that issue before the Commission had exercised its primary jurisdiction over the question in proceedings then pending. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972).

cannot be exempt if the 'person' who receives the gas is the same 'person' who transmits the gas into the facility in the first instance. In effect, the requirement of a 'person-to-person' exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same 'person'." (App. A, p. 19a)

REASONS FOR GRANTING THE WRIT

This case represents an important question as to the intent and purpose of Section 1(c) of the Natural Gas Act, the so-called Hinshaw Amendment, which was enacted by Congress in 1954 to nullify the extension of Commission jurisdiction into the domain of State public utility regulation arising from this Court's decision in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).[7]

It affords this Court its first opportunity to construe this remedial statutory provision, and to do so in a context where the intended restoration of complementary federal and state regulations can be effected while discouraging the construction of duplicative pipelines in coastal and adjacent offshore areas and strengthening competition for onshore and offshore supplies by public

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[7] "The difficulty giving rise to the need for this bill is that under certain interpretations of the Federal Power Commission, principally the interpretation upheld by the Supreme Court in the *East Ohio* case (see the appendix for the text of this case), the Commission has undertaken regulation of some activities of certain companies engaged in the distribution of natural gas whose operations take place wholly within a single State and which can be completely regulated by the respective States. * * * This bill eliminates this duplication by leaving the jurisdiction over these companies exclusively in the States, as always had been intended." "Amending the Natural Gas Act," H. Rep. No. 899, 83d Cong., 1st Sess., p. 2.

utilities exempt from Federal Power Commission regulation under Sections 1(b) [8] or 1(c) of the Act.

1. It was estimated in 1970 that there is a potential undiscovered gas supply of 36 trillion cubic feet under the continental shelf running along the eastern seaboard from Georgia to Maine, and 39 trillion cubic feet of potential supplies under the coastal shelf off Florida, Alabama and Mississippi.[9] In view of the gas shortage being experienced in this country,[10] it has become imperative that these supplies be developed as quickly as possible, be distributed equitably and without overthrowing the regulatory system created by Congress under the Natural Gas Act.

There are many gas pipeline systems serving local markets adjacent to the coastlines of the United States now exempt from Federal Power Commission regula-

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[8] "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C. 717(b).

[9] See map in Appendix B hereto taken from figure 6 to "Potential Supply of Natural Gas in the United States (as of December 31, 1970)" published by the Potential Gas Committee, October 1971. "Potential supply of natural gas" as used in this report means supplies of natural gas to be discovered in the future, sometimes referred to as undiscovered potential supplies and *does not* include proved recoverable reserves or past production.

[10] As recognized by this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

tion under Section 1(c) of the Act.[11] These would lose that exemption were they, like United, to extend their lines offshore and attempt, in the interest of economy and ecology, to purchase newly-discovered gas from producers and to bring the gas ashore in a commingled stream for both their own markets and the more distant interstate markets. Yet this exclusionary result flows from the unreasonably restrictive construction of the Hinshaw Amendment adopted by the Court below.

2. In recent years the intrastate markets have had a significant advantage over the interstate markets in contracting for new supplies of natural gas from onshore fields.[12] Consequently, a ruling by the Federal Power Commission that United's Green System-East formerly deemed intrastate was now subject to the Commission's jurisdiction serves to deprive that system and the consumers served from it, of its important ability to compete for new gas supplies as part of the intrastate market. This is a case where the imposition of Commission jurisdiction has created a quarantine, a highly-prejudicial result which was not called for by the circumstances and could be avoided by a proper appreciation of what Congress intended.

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[11] See Appendix C hereto.

[12] This situation was concisely summarized by the Administrative Law Judge in his initial decision issued December 20, 1972 in *Area Rate Proceeding (Permian Basin Area)*, Docket No. AR70-1 (Phase I) (mimeo p. 8):

> "• • • What has happened in Permian is that the intrastate market has taken, in the recent past, a lion's share of the new gas discovered at a price just over or near the area rates. In fact, according to the evidence of record, several intrastate purchasers in Permian have standing offers to the producers to better interstate ceilings by one or two cents per Mcf. • • •"

3. All of the gas marketed by United from the Green System-East is purchased by United from another person. All of it is purchased by United from producers in or near the coastal and offshore fields where it is produced. The fact that the gas thus consumed in Louisiana on the Green System-East is for a time carried by pipelines under coastal waters and marshes in a commingled state with gas destined for the interstate market does not change this plain fact. To require separate companies to own the pipelines at the point of delivery is to add a requirement not stated in the statute nor required to effectuate its purposes.

4. The Commission has in the past found it no offense against the purposes of Section 1(c) to hold exempt from its regulation a branch of an integrated pipeline system.

> "Utah Gas' remaining contentions raise the question whether a Section 1(c) exemption may be issued covering facilities of a natural gas company which, while satisfying each of the explicit statutory criteria, are interconnected with interstate facilities which remain subject to our jurisdiction. In our view, in the absence of any statutory provision or legislative history compelling a contrary view, the question must be answered in the affirmative otherwise we would be merely encouraging the atomization of corporate arrangements to avoid regulation and creating additional managerial and administrative burdens without reaping any public advantages whatsoever. Indeed, one of the very objectives of the Hinshaw amendment was to obviate the need for natural gas companies to engage in corporate legerdemain in order to avoid Federal Power Commission jurisdiction over local facilities and operations. * * *" [13]

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[13] *Utah Gas Service Co.*, 39 F.P.C. 388-389 (1968). The Commission had actually applied Section 1(c) to United on a prior occasion. *United Gas Pipe Line Co.*, 35 F.P.C. 172 (1966).

5. No regulatory gap [14] is created by the application of the Section 1(c) exemption to the Green System-East.

(a) The Federal Power Commission has no jurisdiction to set rates under direct sales contracts between United and its industrial customers.[15] Neither does the Louisiana Commission, as we have already observed.[16] The same regulatory gap exists in either situation.

(b) The Federal Power Commission would retain its jurisdiction over the curtailment of gas supplies from interstate sources being delivered into the Green System-East. This jurisdiction the Commission already employes in regulating the delivery of gas by interstate pipelines at or within a state to gas companies exempt under Section 1(c).[17]

(c) The Federal Power Commission's rate regulation powers would remain unaffected. For many years the Commission has allocated costs to sales by United which the Commission lacked the power to regulate.[18]

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[14] See *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

[15] See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. at 640.

[16] See n. 3, *supra*.

[17] Thus the Commission has ordered El Paso Natural Gas Company to adopt a certain curtailment plan applicable, *inter alia*, to gas deliveries made by El Paso to companies exempt under Section 1(c) which transport and deliver gas in California where the Public Service Commission also does not regulate direct sales by pipelines. See Opinion No. 634 issued October 31, 1972 in *El Paso Natural Gas Co.*, Docket No. RP72-6, appeal pending *sub nom.*, *American Smelting Co.* v. *FPC*, D.C. Cir. Nos. 72-2204, *et al.*

[18] See *United Gas Pipe Line Co.*, 25 F.P.C. 26 (1961).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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September 1973

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715, 72-1720, 72-1721,
72-1724, 72-1784, 2-2185 and 2-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC., and CITIES SERVICE OIL COMPANY, ET AL., *Petitioners,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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(June 28, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This case is another in the long-running and seemingly endless saga of "Who Gets The Gas?", starring the major oil companies, the natural gas pipelines, major industrial users of natural gas, and the Federal Power Commission. Also featured, albeit in somewhat of a bit part, is the individual gas consumer, "the little lady at the burner tip". Although possibly suited for short subject treatment, this proceeding has now become a full-length feature of epic proportions. Basically it is this court's task to consider petitions for review of FPC Opinions 610 and 610-A, in which the Commission took jurisdiction over a formerly intrastate pipeline in Eastern Louisiana. There are many parties with numerous under-

lying themes to present. From this confusion we must review whether or not the FPC correctly handed out the awards.

In Opinion 610, the FPC found that due to the injection of interstate gas, the formerly intrastate pipeline known as the "Green System-East" was now subject to FPC jurisdiction. Despite all the many different methods used by the petitioners in stating the issues, there are basically only two points for us to consider in reviewing the Commission: (1) Was the FPC correct in holding that the Green System-East had become sufficiently interstate to confer exclusive federal jurisdiction? (2) Even if the system would be otherwise an interstate pipeline subject to jurisdiction, had Congress expressly withdrawn federal jurisdiction for a pipeline such as this by enactment of the Hinshaw Amendment to the Natural Gas Act?

Also, in Opinion 610, the FPC found federal jurisdiction over United's Purple System, another formerly intrastate pipeline. While the majority of the petitioners challenge only the existence of federal jurisdiction over the Green System, two petitioners, Cities Service and Gulf States Utilities, challenge the characterization of the Purple System as interstate. The nature of each of these pipelines will be considered separately below.

The Green System-East

The Green System-East, a natural gas pipeline owned by United Gas Pipe Line Company, is physically situated entirely within the State of Louisiana in United's New Orleans division. For several years prior to October 1, 1970, when United filed an application for FPC certification for the Green System-East, these facilities had been operated as an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. At this point it is necessary to note that the Green System-East is connected through systems of valves with other pipelines,

including United's Black System which is an interstate pipeline. It appears that all the gas which goes into the Green System-East is produced in Louisiana gas fields, although at some point some of this gas may be carried in pipelines which also carry gas dedicated to the interstate market. There exists a heated debate as to whether any gas once placed in the Green System-East can or does ever leave the State of Louisiana. These factual matters are basic to the holding of jurisdiction and will be considered in detail *infra*.

PRIOR PROCEEDINGS

The Green System-East has been involved in a significant chain of court opinions. Petitioner, Louisiana Power & Light, previously brought suit in the United States District Court for the Western District of Louisiana seeking a determination of the intrastate character of the Green System-East. The district court, 332 F.Supp. 692 (1971), dismissed the suit, holding that the issue of the nature of the Green System-East was within the primary jurisdiction of the FPC.

On appeal, we reversed the district court, disagreeing that it was necessary to await Commission action. *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326. This court went on to address the issue of the Green System-East's interstate character and held that any interstate gas which had been introduced into the system was so minimal in amount that federal jurisdiction had not attached.

In *Federal Power Commission* v. *Louisiana Power & Light Co.*, — U.S. —, 32 L.Ed.2d 369 (1972), the Supreme Court reversed this court and agreed with the result reached by the district court. Noting that the FPC was conducting hearings of its own in this regard, the Court held that while the agency's decision would not be the last word, it must be the first. The FPC has now reached its

decision, finding that the Green System-East is sufficiently interstate to be jurisdictional. It is that "first word" of the agency which we now must review and issue, if not the last word, at least the "next word".

I.

Before proceeding to the merits of the controversy, it is helpful to have a firm picture of the various parties engaged in this litigation and their respective interests in its outcome. It is also important to understand the practical effect of FPC jurisdiction on the parties.

The petitioners can be divided into basic groups. The major oil companies have an interest in the outcome both as sellers and purchasers of natural gas. Several smaller distribution companies which purchase gas from United and the Green System are also challenging the Commission decision. Of course, the petitioners include several state regulatory agencies charged with the duty of regulating pipelines which are intrastate in nature. Public utilities which purchase natural gas for resale are involved as parties, as are various towns, parishes and municipalities, both as gas purchasers and representing the public interest. Basically, the effect of federal jurisdiction over the Green System-East will have a similar effect on each of these parties, although not to the same degree.

The petitioners, quite naturally, paint themselves as the heroes of this piece, denominating United as the villain and the FPC as conspiratorial bedfellow or, at the least, stooge of United. In giving depth to this characterization of United, the petitioners seek to show United as a greedy, over-reaching and somewhat callous corporate giant out to gorge itself at everyone's expense. The accuracy of this picture, they say, is made crystal clear by the results which will flow from FPC jurisdiction in this case.

These horrors which petitioners feel will flow from FPC jurisdiction are basically twofold. First, the switch from

Louisiana Public Service Commission regulation, which, with regard to direct sales is virtually non-regulation, to FPC regulation will permit United to abrogate numerous long-term contracts which it has entered in the past for deliveries of gas to gas purchasers. The importance of this benefit can be seen immediately. Many of these contracts have several years yet to run. They were negotiated in the days when the supplies of natural gas appeared to be endless and, thus, contracts for extremely long terms, such as 20 years, were considered good business, sewing up a customer for the future. Of course, as we all know, with the rise of environmentalism which stressed the importance of natural gas as an essentially "clean" fuel and the realization that natural gas reserves and availability have been drastically overestimated, this country has been plunged into an "energy crisis". This "crisis" seems especially acute in the natural gas industry, possibly because of the greater demands for the fuel. Thus, what gas is available can be sold and indeed will be sold for substantially higher prices on today's market than a pipeline could realize under the old long-term contracts entered years ago. Even regulated prices would be substantially higher than the old contract rates, and it must be remembered that the FPC does not regulate the price of sales to direct customers such as large industries but only sales where ultimately the gas will be resold.

Secondly, the gas shortage has led to the necessary allocation of priorities and rationing of this limited supply of natural gas. Through what is popularly called "curtailment", pipelines are allowed to file, subject to Commission approval, plans of allocation of the available gas, basically to ensure that gas goes not to the highest bidder but to those who need it most in the public interest. FPC jurisdiction, thus, also brings in the almost certain result of curtailment of deliveries, even contractually agreed to deliveries. See *International Paper Co.* v. *Federal Power*

Commission, 5 Cir. 1973, — F.2d — [No. 71-3531, slip opinion dated February 7, 1973].

The parties who sell gas to United for the Green System-East are also worried that if the Green System-East is held interstate they will be in a difficult contractual situation because the gas they are using to fill United's needs is restricted in many cases to the intrastate market only by contracts with those having the gas rights. Thus, they fear that they will have to use other gas to service the Green System-East.

Viewing this situation, the petitioners present United as out after the "fast buck". They allege that United was perfectly willing to be regulated, or in some cases not regulated, by the Louisiana Public Service Commission until it became evident to United that it was to its distinct financial advantage to come under FPC jurisdiction. They further suggest that to obtain Commission jurisdiction, United improperly and perhaps illegally injected interstate gas into the Green System-East, as it could do because of the interconnecting valves, solely for the purpose of creating an argument for jurisdiction to present to the Commission.

United, for its part, seeks to reverse these roles and cast itself as the "good guy". United presents a picture of greedy private industries wishing to gobble up all available gas for their own selfish use, to the detriment of other consumers and the public in general. United claims that any diversion of interstate gas into the Green System-East was because it was absolutely necessary to meet contract deliveries. United supports the Commission finding as in the best interest of the consuming public. Agreeing with United on this point, at least as far as its consumers go, is the Public Service Commission for the State of New York. New York intervened, alleging its fear that United would divert substantial amounts of gas dedicated to the interstate market, including New York consumers, to fill these Green System-East contracts unless the federal authorities exercised control.

Thus, the battle line is drawn and, as usual, the dispute is not over gas alone, but also money. In reviewing the Commission's opinion, we must put away these self-serving charges and countercharges and look to the legal issues of the requisites for federal jurisdiction. In light of the Supreme Court's directive in *Louisiana Power & Light Co.*, supra, our task must begin with the FPC's decision.

II.

Opinions 610 and 610-A

The first question which the FPC faced in entertaining United's request was whether or not the Green System-East was indeed a jurisdictional pipeline. Noting that none of the interconnections at which United alleged interstate gas to have flowed into the Green System had been certificated by the Commission, the FPC stated that "the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the . . . facilities". In its presentation, United had marked a map of its system showing the points at which interstate gas had been injected into the Green System. The amounts of gas injected at each of these points, as found by the Commission, are set out in the margin.[1] Having found that

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[1] (b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Callion Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported

gas which ultimately found its way into the Green System had at one time been transported in a pipeline which car-

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in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

ried interstate gas even though all the gas was produced within Louisiana and had never physically been outside the state,[2] the Commission went ahead to decide whether or not the amount gave it jurisdiction.

The Commission found that the amounts involved were substantial and were sufficient to give the Commission jurisdiction. On peak days for 1970 and 1971 which were chosen, the Commission figures showed that 153,376 Mcf and 189,846 Mcf, respectively, flowed into the Green System-East. The Commission rejected a *de minimis* argument made by several of the petitioners stating that the interstate portion of the gas on peak days represented 7.79 percent of the requirements and on an annual basis, 2.39 percent of the requirement.[3] Several of the parties dispute these findings made by the Commission, especially the holding as to the total amount introduced into the Green System-East. We will discuss these points in more detail later in the opinion.

Viewing the total picture presented by all the various factors in the record before it, the FPC found that the Green System was an integrated part of United's interstate (or Black) system and that the Green System-East could no longer be left to state regulation as a purely intrastate pipeline. We note that the Commission somewhat retreated from its suggestion that Green System gas flowed out of the State of Louisiana in a physical form. In Opinion 610-A, the FPC stresses that its finding that Green System gas is introduced into mid-Louisiana's pipeline is simply to show that it is commingled with gas which has moved in interstate commerce. This factor, according to the FPC,

---

[2] This is in dispute, but it is clear that some gas once carried in the Green System-East ends up in an *interstate* pipeline owned by Mid-Louisiana, but in all probability this gas does not physically leave Louisiana.

[3] Adjustments raise these figures to 10.7% and about 3.4%, respectively.

gives support to its holding that the Green System has become integrated with interstate systems even though the gas itself never flows out of the state.

The FPC went on to hold that jurisdiction was not to be determined by the amounts of gas involved. They held that jurisdiction attached wherever even an infinitesimal amount of interstate gas was injected into the system. For these purposes, the Commission defines interstate gas as any gas which had ever been carried in a certificated interstate pipeline.

Section 1(c) of the Natural Gas Act, commonly known as the Hinshaw Amendment, provides an exemption from federal regulation wherever all the gas received by the system is to be consumed wholly within the state. The Commission refused to apply the Hinshaw exception, apparently finding that the Green System-East was an integrated facility and part of United's total system.

Relying on *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), and this court's Florida Parishes opinion, *Louisiana Public Service Commission* v. *FPC*, 5 Cir. 1966, 359 F.2d 525, the FPC held that there had been sufficient commingling of intrastate and interstate gas to require that the Commission take jurisdiction over the Green System-East. The Commission also expressly rejected the argument that United had illegally and improperly introduced interstate gas into the Green System-East. First, it found the amounts injected were necessary to meet contract commitments, but, more importantly, stated the existence of jurisdictional facts controlled no matter what the motive.

Commissioner Carver dissented from Opinion 610. His primary reason for dissenting was his feeling that this circuit's opinion in *Louisiana Power & Light* v. *United Gas Pipe Line Co.*, 456 F.2d 326, which had not yet been passed on by the Supreme Court, was controlling and that the

Commission was bound by *res judicata*. In his remarks, Commissioner Carver criticized the Commission for failure to take account of what he felt were the obvious reasons that United was now seeking Commission jurisdiction. He pointed out that the long-term industrial contracts were no longer beneficial to United because of the low rate structure and impending supply crisis. He also referred to the protected curtailment that United had previously sought from the Commission. See *International Paper Company* v. *FPC*, 5 Cir. 1973, — F.2d —, [No. 71-3531, slip opinion dated February 7, 1973]. He further stated:

> Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands.

Following the petitions for rehearing, the Commission issued Opinion 610-A. In this opinion, the Commission retreated somewhat from its conclusion that Green System-East gas flowed out of the State of Louisiana. The Commission also attempted to clear up several other statements in Opinion 610 which were questionable. Commissioner Carver again dissented. He points out that the retreat as to Green System-East gas flowing out of the State of Louisiana undermined the entire finding of jurisdiction. Furthermore, he objected to the majority's use of "official notice" in considering flow charts not made a part of the record in the case without giving the parties an opportunity to present analysis of those flow diagrams. Commissioner Carver concludes that the interstate gas which does flow into the Green System-East is so minimal and insignificant that the Commission should not take jurisdiction.

III.

At the outset, we note that the FPC has apparently decided to treat the entire Green System, formerly known as Green System-East and Green System-West, as a single

unit for purposes of determining the existence of federal jurisdiction. In the past the Green System-East has been that part of United's New Orleans division facilities lying east of United's Napoleonville-Kosciusko interstate pipeline system. There is no abrupt stopping point for Green System gas when it reaches the Napoleonville-Kosciusko line; it simply continues to flow on toward the Baton Rouge area, but with the pipe denominated the Green System-West. Apparently this artificial division has been allowed to exist unchallenged for a number of years. In the past this one continuous pipeline has apparently been treated, for certification purposes, as two separate entities. The Green System-West has long been certificated while the Green System-East has been considered totally intrastate. As Commissioner Carver points out in his dissent to Opinion 610:

> However, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit, free of Federal regulatory impact, and free to contract in any manner it chose, consistent with State law.

In Opinion 610, however, the FPC indicates that at this time the whole New Orleans facility, the entire Green System, must be considered as a unit.

The FPC, in finding jurisdiction, relies heavily on the fact that gas which must be denominated interstate gas flows into and out of the Green System. The flow charts used by the Commission for the year 1969 show that

5,419,519 Mcf of gas were supplied from interstate lines into the Green System-East, that part of the Green System east of the Napoleonville-Kosciusko line. Aside from a minuscule and irregular injection of less than 14,000 Mcf at Point "K", this entire volume of gas was injected at Points "I" and "J". The FPC found that this gate was interstate in nature because it was taken from a commingled stream of gas designated for the interstate market. Both Points "J" and "I" present similar factual situations since they both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading to United's interstate system, the other into the Green System-East.

The Commission also held that substantial quantities of interstate gas were delivered into the Green System at Points "L" and "M", which are both located west of the Napoleonville-Kosciusko line in the Green System-West. At Point "L" over 38,000,000 Mcf is delivered into what is known as the Willow Glen Loop. This loop is also supplied with almost 7,000,000 Mcf directly from the Green System-West and it should be noted that this exit for Green System gas is located very close to the alleged breakpoint between the Green System-East and the Green System-West and that this injection of almost 7,000,000 Mcf is over three-fourths of the total volume which the so-called Green System-East delivers to the so-called Green System-West. At Point "M", the Napoleonville-Kosciusko line delivers approximately 2,000,000 Mcf into the so-called Green System-West. This 2,000,000 Mcf joins with the almost 2,000,000 left after delivery to the Willow Glen Loop and, with various further receipts and deliveries in the so-called Green System-West, continues on to the end of that pipeline for exchange into Mid-Louisiana's interstate pipeline for transportation and sale within the Baton Rouge area. It should be noted that the Mid-Louisiana line contains interstate gas flowing in from Mississippi.

Based on these injections and comminglings of interstate gas into and within the Green System, the Commission found that it had jurisdiction over the entire system. In its opinion, the FPC noted that, even without consideration of Points "L" and "M", after adjustments, about 3.4% of the Green System-East's annual requirements were supplied from these interstate gas sources. For the peak day of January 6, 1970, the adjusted figures did show that 10.7% of the flow into the Green System-East facilities was injected from interstate gas. The Commission expressly found that these quantities are not *de minimis*. The Commission expressly found that without these injections of interstate gas there would have been a serious deficiency to serve the New Orleans area. Furthermore, the Commission found that this deficiency will seriously increase in the next few years, especially during the peak winter months, with the result that more and more interstate gas would have to be diverted to satisfy commitments. Thus, the Commission has explicitly held that the interstate injections are not minimal in amount nor are they of a temporary nature. Rather, the Commission feels that the amounts were significant, especially on peak days, and that continued delivery of interstate gas will be necessary to fill contractual obligations on the Green System-East.

Several, but not all, of the petitioners attack the Commission's use of a commingling theory based on *People of the State of California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corporation*, 379 U.S. 687 (1965); and, most especially, our decision in *Louisiana Public Service Commission* v. *FPC*, 5 Cir. 1966, 359 F.2d 525 (commonly called Florida Parishes). In seeking to distinguish these cases the petitioners rely on this court's opinion in *Louisiana Power & Light Company* v. *United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326, in which we held that "the flow of gas from the Black System into the Green System in the case at bar is occasional and irregu-

lar as well as minimal". Id. at 339. The petitioners stress that our conclusion in that case was based on substantially the same evidence presented to the Commission and that we must now reach the same result.

As previously noted, the Supreme Court vacated that part of our opinion referred to above which held that there was no FPC jurisdiction over the Green System-East. 32 L.Ed. 2d at 389. The Court held that the determination of jurisdiction was for the FPC in the first instance with our role limited to the normal processes of judicial review under the Natural Gas Act.

The Federal Power Commission was set up by Congress to bring a degree of regulatory expertise to the problems of regulating the transportation and consumption of natural gas, as well as other forms of energy. Because of their familiarity with the area in which they operate, the Commissioners are able to make substantially more accurate judgments than courts would be. Here the Commissioners have found that the injections of gas of an interstate character are not minimal and irregular, but are indeed substantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments. Because of our prior holding, it is almost certain we would not reach the same conclusion as an initial matter. However, ours is not to substitute our judgment for that of the FPC on an issue where that body's intimate knowledge of the specific problems is concerned. We feel that determinations as to the amounts and constance of the flow and their characterization in terms of impact and necessity therefor, once made by the Commission, cannot be lightly set aside by a court. In *Louisiana Power & Light* we were admonished by the Supreme Court to give the Commission the first chance to determine its jurisdiction in this case. The Commission has found that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. In making this

latter determination, the Commission expressly considered and rejected the position of this court in *Louisiana Power & Light* as it applied to the facts found. Disagreeing with our holding that the injections were minimal, the FPC pointed out that the peak day injections were sufficient to heat over 100,000 homes. Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, Administrative Law Treatise §30.05.

Among other things, the Commission found that any amount of interstate gas would give jurisdiction. The opinion seems to suggest that one molecule would be sufficient to automatically confer federal control. We do not reach or consider that issue in this opinion. It appears to this court that there would clearly be times when the amounts of natural gas involved would be so irregular and minimal that Commission jurisdiction would be absurd. However, as noted, the Commission has found that such is not the case as to the Green System-East and we find that to reverse the Commission on this point would simply be substituting our own judgment for that of the Commissioners, a luxury that we do not possess under our limited review.

Thus, we find we must sanction those parts of the FPC's Opinions 610 and 610-A which establish federal jurisdiction over the Green System as an interstate pipeline. We are somewhat troubled by the assertion of Commissioner Carver and several of the petitioners concerning United's motive in obtaining FPC jurisdiction. However, we do not feel that we have any available way to step in and sort out the competing inequities and reach what would be the fairest result for all concerned. That is the job for the Commission, and it is for the Commission to decide how to balance competing equities or how to penalize "unclean" parties in appropriate cases.

We would point out that federal regulation is not to be considered a plaything to be turned on and off to suit a pipeline's financial advantage. We feel confident that the FPC would not allow itself to be so used and are certain that courts would not allow such a practice to continue. Despite the innuendo and insinuation in this case, we see no direct evidence to support these suggestions of improper motive and conduct.

IV.*

The Hinshaw Amendment

Section 1(c) of the Act (the "Hinshaw Amendment") describes certain persons and facilities whose participation in the transportation and sale of gas in interstate commerce is "primarily of local concern and subject to regulation by the several States". 15 U.S.C. § 717(c). Under § 1(c) these persons and facilities are exempt from the jurisdiction of the Commission.[4]

---

* Judge Bell authored Part *IV, The Hinshaw Amendment,* for the court.

[4] The text of the provision is the following:

> (c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

In the proceedings before the Commission the petitioners maintained that even if the gas transmitted through the Green System-East were interstate in character, the Commission would not have jurisdiction over it because the Green System-East falls within the provisions of § 1(c). The Commission held that the Green System-East is not an exempt facility within the meaning of that section. The petitioners contend this holding was erroneous. We disagree.

Congress enacted the "Hinshaw Amendment" to preserve state control over local distributors who purchase gas from interstate pipelines.[5] Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems.

We discern this intent in the legislative history. During the debate in both houses, supporters of the measure were at pains to emphasize that the proposed exemption was not for the benefit of interstate pipeline companies. See, e.g., 99 Cong. Rec. 10569-70 (remarks of Congressman Hinshaw, Harris, and Yates). Critics of the measure suggested that the exemption would provide interstate pipelines with a means of defeating federal jurisdiction over portions of their operations which deliver gas for consumption wholly within a single state. One senator suggested that if an interstate pipeline placed one of its state-wide delivery systems under the control of a wholly owned subsidiary and delivered gas to the subsidiary at the state line, the local system would qualify for exemption under the terms of the bill. See 100 Cong. Rec. 3173 (remarks of Senator Burke).

---

[5] The amendment was necessary because of an early decision of the Supreme Court which, in construing the scope of the Commission's jurisdiction over the transportation and sale of gas "in interstate commerce", held that interstate gas does not lose its interstate character in the hands of local distributors who buy gas for resale and ultimate consumption within the state. *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950).

Senator Bricker, one of the sponsors of the bill in the Senate, vehemently denied this:

> "[T]here is no intent to place any pipeline company outside the jurisdiction of either the Interstate Commerce Commission or the Federal Power Commission.
>
> "As soon as such a pipeline company were formed, it would come within the jurisdiction of the Federal Power Commission.
>
> "This measure is not an effort—and I make this statement for the RECORD—to remove such companies from the jurisdiction of the Federal Power Commission. If such an interpretation is made, it is without basis or support or foundation upon anything stated at any of the committee hearings." *Id.*

The congressional intent not to exempt local segments of integrated interstate pipeline systems from regulation by the Commission finds clear expression in the language of the statute. Thus, under § 1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same "person".

In the present case we are not called upon to define with precision the degree of independence that must exist between the person who gives and the person who receives

gas at or within state lines in cases where the exemption is warranted. Nor need we consider the propriety of the Commission's prior determinations with regard to the availability or non-availability of the exemption in other cases. Under any plausible reading of the "other person" requirement, the Commission's determination in this case must be sustained.

By virtue of the flow of interstate gas from the Black System into the Green, the Green System-East has ceased to be an intrastate facility and has become, instead, a local branch of an integrated interstate pipeline. In all its relevant parts, this pipeline system is operated by one person: United. At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points—the points at which the exemption must take effect, if at all—the "person-to-person" requirement simply is not met.

Petitioners contend, however, that the requisite exchange from one person to another need not occur at the points where the exemption must take effect. They say that the person-to-person requirement may be satisfied by exchanges occurring at other points in the network of distribution or supply. Specifically, they claim that in this case the requirement may be satisfied by various exchanges that occur between the Black System and certain independent procedures "upstream" of the points of connection between the Black System and the Green, or by various exchanges between the Green System and certain independent intrastate producers "downstream" of these points of connection.

The legislative history makes it clear, however, that in the contemplation of the supporters and the critics of § 1(c) the exchange between the two persons described in the statute took place at a point where an exemption was necessary to protect the receiver from federal jurisdiction that

would otherwise exist under the *East Ohio* decision.[6] In other words, the point of the person-to-person exchange was a point where exemption was needed, and it was the point where the proposed exemption was to take effect. See the Senate and House debates, *supra*.

Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green System-East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the points of connection between the Black System and the Green—the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

The logic of a technical requirement that identifies the point of exemption with the point of the requisite exchange is apparent on the facts of this case. The contributions by independent producers of intrastate gas downstream of the points of connection between the Black System and the Green, or the contributions of interstate gas upstream of these points, do nothing to change the fact that the Green System is now a local branch of an integrated interstate system. Given Congress' overriding intent not to bifurcate the regulation of such system, these contributions should not enhance the Green System's eligibility for exemption under § 1(c). Under our interpretation of the person-to-person requirement, they do not.[7]

---

[6] See Footnote 5.

[7] Because we decide the Hinshaw issue on this ground, we need not consider the other grounds asserted by the Commission as a basis for its refusal to recognize the allegedly exempt status of the Green System-East.

The Purple System

The "Purple System" is a pipeline system in United's Lafayette district in southwestern Louisiana. This pipeline system, like the Green System-East, has long been considered an intrastate pipeline not subject to Commission jurisdiction. Two parties, Cities Service Oil Company and Gulf States Utilities Company, challenge the FPC's holding of federal jurisdiction over the Purple System.

The FPC, without dissent as to these facilities, made specific findings showing that the Purple System is unquestionably an integrated part of United's interstate system. At Point "A", United obtained gas for the Lafayette facilities by exchange with an interstate transmission line of Texas Eastern Transmission Corporation. At Point "B" on the system map, United obtained over 1,000,000 Mcf on an annual basis from an interstate line of Texas Gas Transmission Corporation. At Point "C" on the flow chart, United delivered, on an annual basis, over 24,000,000 Mcf to Penzoil Pipeline Company for transportation across the Louisiana line into Texas. At Point "D", United received over 1,000,000 Mcf from Tennessee Gas Pipeline Company's interstate pipeline. As Point "H", over 16,000,000 Mcf were supplied into two streams, with a little over one-half being delivered into one of United's interstate pipelines for transportation out of the state, and the remainder used in the intrastate system. Finally, at Point "O", Tennessee delivered over 22,000,000 Mcf on an annual basis to United's Purple facilities which were commingled with locally produced gas and used in the Lake Charles area.

These facts amply establish that the Purple System is an integrated pipeline facility with many connections and exchanges of gas with interstate facilities. Gas clearly flows out of this system for interstate markets at Point "C". Significant volumes of gas from interstate facilities are introduced into the Purple System for local sale.

Cities Service attempts to distinguish the *Amerada, Lo-Vaca* and *Florida Parishes* cases by stating that all the facilities used for transportation for delivery to Cities Service at its refinery are located in Louisiana and all of the gas used at the Cities Service plant originates at production points or exchange points within Louisiana. Cities Service alleges that this makes the pipeline system purely intrastate.

On the contrary, we feel the evidence clearly establishes that this Purple System is part of an integrated pipeline network involving significant transportation of interstate volumes. We feel that the *Amerada, Lo-Vaca* and *Florida Parishes* cases cannot be distinguished successfully. We will not "lop off" certain parts of the otherwise integrated system to create an artificial intrastate pipeline.

For the reasons set forth above, the result reached by the FPC in Opinions 610 and 610-A with regard to jurisdiction over the Green System and Purple System is

AFFIRMED.

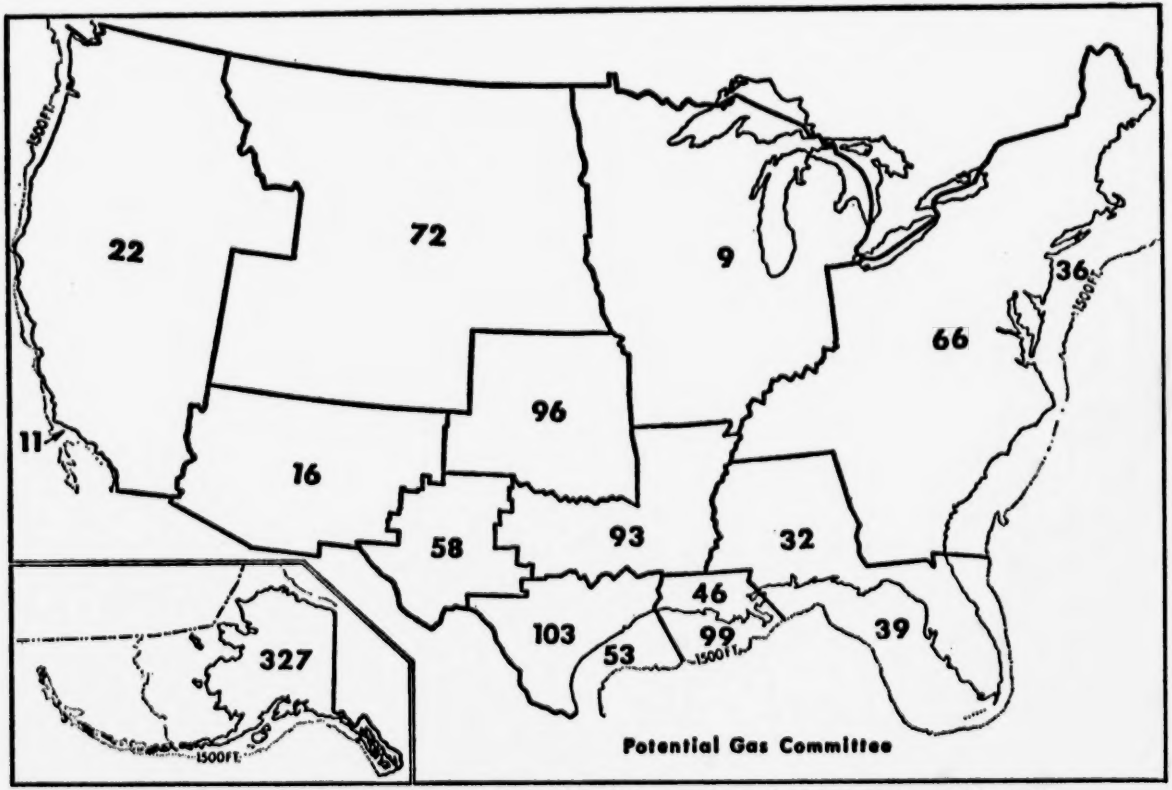

FIGURE 6 — Total Potential Gas Supply as of December 31, 1970 (Total: 1,178 trillion cubic feet).

APPENDIX C

List of Gas Companies Adjacent to the Coasts of the Atlantic Ocean and Gulf of Mexico Exempt From FPC Regulations Under Section 1(c) of the Natural Gas Act

STATE	COMPANY
Maine New Hampshire	Northern Utilities, Inc.
Massachusetts	Brockton Taunton Gas Company Fitchburg Gas & Electric Company Haverhill Gas Company
Connecticut	Connecticut Gas Company Hartford Gas Company
New York	Brooklyn Union Gas Company Central Hudson Gas & Electric Company Consolidated Edison Company of N. Y.
New Jersey	Elizabethtown Gas Company New Jersey Natural Gas Company Public Service Electric & Gas Company South Jersey Gas Company
Delaware	Delaware Power & Electric Company
Virginia	Commonwealth Natural Gas Corp.
North Carolina	North Carolina Natural Gas Corporation Public Service Company of North Carolina Piedmont Natural Gas Company, Inc.
South Carolina	Carolina Pipeline Company South Carolina Electric & Gas Company

STATE	COMPANY
Georgia	Atlanta Gas Light Company
Alabama	Alabama Gas Corporation Mobile Gas Service Corporation
Mississippi	Mississippi Valley Gas Company
Louisiana	Central Louisiana Electric Co., Inc.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-867

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioner

versus

FEDERAL POWER COMMISSION

PETITION OF LOUISIANA POWER & LIGHT COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1973

NO.

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioner

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FEDERAL POWER COMMISSION

PETITION OF LOUISIANA POWER & LIGHT COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Louisiana Power & Light Company (LP&L) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in No. 72-1714, *Louisiana Power & Light Company, et al v. Federal Power Commission.*

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*, at A-7) is not yet reported. The opinions and orders of the Federal Power Commission (FPC) (App. B, *infra*, at A-34 and A-77) are reported at 47 F.P.C. 245 and 1021.

JURISDICTION

The opinion of which petitioner seeks review was issued June 28, 1973. Petitions for Rehearing and for Rehearing En Banc were denied September 5, 1973. Stay of Mandate as to LP&L was issued October 10, 1973 to afford opportunity for review by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. §717 *et seq.*, of natural gas pipeline facilities located wholly in one state, which facilities transport only gas produced in that same state and the gas thus transported is consumed wholly within that same state?

As an alternative question that would arise from accepting inaccurate assertions by the FPC to be facts, is Section 1(c) of the Natural Gas Act applicable to facilities used to transport natural gas received into those facilities from another person within the same state in which the gas is then wholly transported and ultimately consumed, and the facilities are subject to regulation by a state commission?

2. Whether the United States Court of Appeals for the Fifth Circuit erred in sustaining a conclusion by the Fed-

eral Power Commission that a gas pipeline corporation had transformed an intrastate gas pipeline into an interstate one through the unauthorized introduction into that pipeline of less than a substantial amount of interstate gas in the absence of substantial evidence on the record to sustain such a conclusion?

STATUTES INVOLVED

Both questions invoke interpretation of the Natural Gas Act, 15 U.S.C. §717, reproduced herein at P. A-1 of Appendix A and the Administrative procedure Act, 5 U.S.C. §§556 (d) and 706, reproduced herein at P. A-4 of Appendix A.

STATEMENT OF THE CASE

This case involves the jurisdictional status of a pipeline facility of United Gas Pipe Line Company (United) located wholly within the State of Louisiana in an area south of New Orleans to east of Baton Rouge known as the Green System East. For over thirty years the Green System East has been serving only intrastate customers, and has therefore been subject to the jurisdiction of the Louisiana Public Service Commission (Louisiana Commission) and not the FPC. But on October 1, 1970 United filed an application with the FPC for a Certificate of Public Convenience and Necessity, pursuant to Section 7(c) [15 U.S.C. §717f] of the Natural Gas Act, for authorization" to continue operating certain facilities and to continue rendering certain services heretofore treated as local or intrastate in character." In effect United was asking the FPC to take jurisdiction over pipeline facilities that had been theretofore considered to be and operated as intrastate facilities under the jurisdiction of the Louisiana Commission. The motivation of United in making this application was rather

transparent. As eloquently described by FPC Commissioner Carver in his Dissent to Opinion No. 610 dated February 9, 1972,[1] United was and is engaged in an effort to use the FPC's jurisdiction as a shield against contracts now deemed improvident, *i.e.*, more money could be made by selling the gas to new customers at higher prices.

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[1] I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contact in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, *Florida Parishes* was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipeline capacity needed markets. But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ... FPC ..... (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding. My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

THE COMMISSION DECISIONS BELOW

In Opinion 610 issued February 9, 1972, Appendix B at A-34 herein, confirmed by Opinion 610-A issued April 7, 1972, Appendix B at A-77 herein, the FPC held that the Green System East had become interstate by reason of the infusion of interstate gas into the intrastate system.

THE COURT DECISION BELOW

The Court of Appeals for the Fifth Circuit sustained the FPC's finding on the ground that it had only a "limited review" of FPC determinations and that, when the FPC found that there had been an infusion of interstate gas into the Green System East and that such infusion was not minimal, it could not say there was no "reasonable basis" for the FPC's finding of jurisdiction although it was "almost certain" that the Court "would not reach the same conclusion as an initial matter."

REASONS FOR GRANTING THE WRIT

The issue presented by this case is of fundamental importance to the administration of the Natural Gas Act and to the utilization of the natural gas resources with which that Act is concerned. The decision below which conflicts in principle with prior decisions of this Court as well as a prior decision of another panel of that same court, would grant to the FPC jurisdiction over wholly intrastate facilities and would turn over to the FPC jurisdiction properly belonging to the Louisiana Commission to regulate and allocate the uses of gas being produced, transported and consumed wholly in Louisiana. Thus, the question of the utilization of that portion of the natural gas produced

in Louisiana and dedicated to Louisiana consumption — completely divorced and apart from the substantial majority of amounts of gas taken out of Louisiana for consumption elsewhere as allocated by the FPC — would be placed in the hands of a federal regulatory body less responsive to the needs of the State of Louisiana than is the Louisiana Commission. Additionally, if certain inaccurate assertions by the FPC are accepted as facts, as the Court of Appeals did by failing to apply the "substantial evidence" rule, then still another question of overriding importance to the administration of the Natural Gas Act arises: the question of first impression as to whether Section 1(c) of the Natural Gas Act is applicable to facilities used to transport natural gas received into those facilities from another station within the same state in which the gas is then wholly transported and ultimately consumed, the facilities being subject to regulation by a state commission. This question of interpretation of the Hinshaw Amendment is of national importance, there being literally hundreds of Hinshaw exemptions outstanding in such gas-producing states as California, Texas, Oklahoma and Louisiana to mention the prominent producing states, all of which Hinshaw exemptions are affected to some degree by the decision below.

In *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 721, 92 S.Ct. 1827 (1972), this Court considered the question whether the FPC had jurisdiction over the pipeline known as the Green System East of sufficient importance to grant certiorari to the Fifth Circuit. This Court held there that the question of the FPC's jurisdiction was within that agency's primary jurisdiction, subject to review under the Natural Gas Act. Petitioner LP&L now seeks that review.

THE SUBSTANTIAL EVIDENCE ISSUE

The decision of the Fifth Circuit sought to be reviewed is erroneous in several respects. It sustained a finding that the facility in question was subject to the jurisdiction of the FPC despite the absence of "the channel of constant flow" of interstate gas required under this Court's decisions in *Interstate Natural Gas Company v.* F.P.C., 331 U.S. 682; *California v. Lo-Vaca Gathering Company,* 379 U.S. 366; and *F.P.C. v. Amerada Petroleum Corp.,* 379 U.S. 687, and the Fifth Circuit's own decision in *Louisiana Public Service Commission v. Federal Power Commission,* 359 F.2d 525 (1966).

In so doing it also denied petitioner review under the Substantial Evidence Test applicable to proceedings under the Natural Gas Act by (a) applying the so-called Rational Basis Test and (b) predicating its opinion on documents not in the record which petitioner has had no opportunity to contravene. With respect to the former aspect of this error, the Court below has violated the test established by the Administrative Procedure Act, developed by this Court in *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474, and held applicable to FPC proceedings in *Gainesville Utilities v. F.P.C.,* 402 U.S. 515. With respect to the Commission's reliance on matters outside the record, the Court's sustaining their use is also inconsistent with the decision of the Court of Appeals for the District of Columbia in the *Texas Gulf Coast Area Natural Gas Rate Cases* [No. 71-1828] decided August 24, 1973, creating a substantial conflict between the circuits which must be resolved.

Although this Court did hold in *F.P.C. v. LP&L* that it was for the FPC to determine in the first instance its

own jurisdiction, the Court's opinion cannot be read as authorizing the Commission to depart from the law in making its determination. The applicable principle established by decisions of this Court is that one must examine "the anatomy of the pipeline system to discover the channel of constant flow" to see whether the gas in this channel crosses a state line at any stage of movement from wellhead to ultimate consumption. *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682; *Lo-Vaca*, supra; *Amerada*, supra. The channel of gas in the Green System East never crosses a state line.

Opinion No. 610 found that some of the Green System East gas flowed *from* that system out of the state (Paragraphs 36, 37 and 38). However, as there was not even a scintilla of evidence to sustain this finding by the FPC, which was a physical impossibility owing to the difference in pressure between the Green System and other facilities of United (Tr. 323-324, 556; and admissions by United's Messrs. Echterhoff and Belvin in No. 71-2550 of the Court of Appeals), the Court of Appeals did not sustain the FPC on this rationale but permitted the theory, also advanced by the Commission, that even the introduction of small amounts of interstate gas *into* an intrastate system was sufficient to transform that system into a jurisdictional pipeline. Apart from that theory being unsupported by the record facts[2] it cannot be sustained under this Court's

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[2]The principal basis for the FPC's conclusion that interstate gas was being infused into the Green System East derives from the circumstances existent at Points I and J of United's flow diagram Appendix C herein at A-98. The record before the FPC showed clearly that the same situation exists at both Points: The gas comes from the field to a gas processing plant (Getty Oil at Point I, Humble at Point J) and after being processed, i.e., removing hydrocarbons such as propane or butane, United takes delivery of the gas from the plant and places the gas into one of two lines — one that goes to the Black (interstate) System, the other that goes to Green System East (See the diagram, Exhibit 29,

decision in *California v. Lo-Vaca Co.*, 379 U.S. 366, 369, where it was held that federal jurisdiction was created by commingling of gas sold for consumpton intrastate with a *substantial* amount of gas to be resold in interstate commerce.

The Court below and the FPC have tried to avoid the impact of *Lo-Vaca* by stating that the amount of interstate gas involved is more than *de minimis*. But so labeling the minuscule percentage involved does not make it substantial, apart from the judicial fact that *de minimis* is an irrelevant doctrine here, the measure being the channel of constant flow.

Moreover, the percentages of interstate gas which the FPC stated were introduced into the Green System East were based upon its *ex parte* notice of the certain flow diagrams not in evidence and which neither petitioner nor any other party was given any opportunity to contravene. The reliance by the FPC on that extra-record "evidence" constitutes a denial of administrative due process by the Commission. The Court of Appeals for the District of Columbia, in *Texas Gulf Coast Area National Gas Rate Cases*, decided August 24, 1973, held that reliance by the FPC on evidence not in the record rendered its rulings unsupportable since the requirement of sub-

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reproduced in Appendix "C" hereto at A-98). There is no basis in this record for a conclusion of commingling.

As for Points L and M, any reliance by FPC on those situations runs afoul of its own witnesses (Tr. 323-324, 556) who testified that Green Gas could not get into the Black System because the Green System operated at a lower pressure than the Black System and there were no compressors on the Green System with which to lift the pressure so that it could enter the Black System. Additionally, such a conclusion by the FPC would render the whole proceeding before it an absurdity because the basic premise upon which United was supposedly required to infuse Black Gas into the Green System was the shortage of gas for the Green System. How then could the Green System be an exporter to the Black System as suggested by the FPC and seriously discussed by the Court of Appeals?

stantial evidence under the Natural Gas Act reflects a Congressional intent to limit agency determination to record evidence.

Texas Gulf Coast adds conclusive weight to Commissioner Carver's dissenting opinion in No. 610-A:

> "The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5) . . .
>
> "Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as as to interpretations of the record and notice data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, Sec. 556(d), U.S. Code and its judicial antecedents."

Even the Court of Appeals did not find that the Commission's Opinion and Order were supported by substantial evidence. Instead, it sustained the Commission on the ground of the so-called "rational basis" test:

> "Exercising our limited review as opposed to interpreting *de novo* we find we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See *Davis, Administrative Law Treatise* §30.05." Appendix B at A-23.

Davis § 30.05 explains the "Rational Basis Test" as a

device sometimes used by courts to avoid a determination of what is a question of fact and what is a question of law. That use preceded this Court's opinion in *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1950), which requires the courts to make a determination that there *is* substantial evidence in the record to sustain an agency's finding. Interpreting identical language to the Natural Gas Act in the Federal Power Act, this Court has held the FPC bound by the substantial evidence test. *Gainesville Utilities v. F.P.C.*, 402 U.S. 515. Judicial review of an agency's decision should consist of a finding that "it has a rational basis *and* is supported by substantial evidence." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 126 (1962, emphasis added). Therefore, the Fifth Circuit's decision sustaining the Commission in the absence of substantial evidence is contrary to law.

THE HINSHAW ISSUE

The Hinshaw Amendment, Section 1(c) of the Natural Gas Act, was specifically designed to avoid the effect of *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266 (1949). That Amendment was designed to exempt from FPC jurisdiction *inter alia* (1) facilities used by (2) any person engaged in the transportation in interstate commerce of natural gas (3) received by such person from another person within or at the boundary of a State (4) if all the natural gas so received is ultimately consumed within such State (5) provided that the rates and service of such person and facilities be subject to regulation by a State commission.

Despite these five clear benchmarks, the Court of Appeals has devised a test of its own and named it the

"person-to-person requirement." It explained the requirement thus:

> "Thus, under §1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance."

Having explained this requirement, the Court below then concluded:

> "Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green System East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the points of connection between the Black System and the Green — the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

Assuming the "person-to-person" requirement is correct, we submit that the Court of Appeals is clearly on the inescapable horns of a dilemma: Either the Green System is intrastate by reason of no Black gas being infused into it or, if Black gas is infused, then Section 1(c) is applicable.

Let us explain by reference to the record facts. In Appendix C at p. A-98 we have reproduced in detail the delivery situation at Point I, which detail is also applicable to Point J, these being the only relevant points of connection. Now, the record shows that the gas goes through the gas processing plants (which are owned by Getty Oil Company at Point I and Humble at Point J) which extract hydrocarbons (propane, butane, etc.) from the gas, and the gas is then delivered to United. If it be concluded that the delivery point is immediately upon leaving the Getty Plant (marked by us "Point of Entry"), then the gas is being delivered to United — a "person" — by Getty —"another person"— and the "person-to-person" requirement is obviously satisfied. On the other hand, if it be concluded that the delivery from Getty to United takes place after the gas passes through the 93' of separators, regulators, and meters (at the place we have marked "Point of Separation"), then there is no infusion of Black gas into the Green System. Under the requirement established by the Court of Appeal, either the Green System East is intrastate or it is entitled to a Hinshaw Amendment.

CONCLUSION

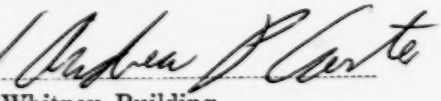
The decision of the FPC to transform a hitherto intrastate pipeline into an interstate one by fabricating injections of interstate gas that the record facts show to be non-existent is presently resulting in severe economic hardship to what some have described as "the Ruhr of America," the heavily industrialized area of the country running from Baton Rouge to New Orleans and, worse than that, it is causing hardship to the human needs Louisiana customers —homes, schools, hospitals—who have no alternative fuels available, such as coal and nuclear energy, in contrast to most other sections of the nation.

The Court of Appeals has failed in its review responsibilities, permitting the FPC to determine this serious case on the basis of *ex parte* extra-record material and upon a misconstruction of record facts. Additionally, the Court of Appeals misapplied the record facts to the statutory benchmarks of the Hinshaw Amendment.

This Court guaranteed in *Federal Power Commission v. Louisiana Power & Light Company* that the decision of the FPC would be reviewed pursuant to the Natural Gas Act. That review has been denied through the error of the Court of Appeals in abdicating its proper scope of review under the "limited review" theory. This Court now has the opportunity to make its guarantee good by granting our writ, and we submit that it should do so in the light of the national importance of this case to the energy crisis and to the orderly administration of the Natural Gas Act.

Respectfully submitted,

MONROE & LEMANN
Andrew P. Carter
H. Sloan McCloskey
William T. Tete

By 

1424 Whitney Building
New Orleans, Louisiana 70130

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 1973 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to all counsel of record for the parties.

s/ Andrew P. Vance

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Natural Gas Act, 15 U.S.C. §717

(Section 1)

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interestate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that

the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

Natural Gas Act, 15 U.S.C. §717(r)

(Section 19)

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall

deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order

such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646 § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947.

Administrative Procedure Act, 5 U.S.C. §556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order

issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Administrative Procedure Act, 5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B—OPINIONS BELOW

Opinion of the Court of Appeal

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185, and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC., and CITIES SERVICE OIL COMPANY, ET AL,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Revie wand Set Aside Opinions and Orders of the Federal Power Commission

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(June 28, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This case is another in the long-running and seemingly endless saga of "Who Gets The Gas?", starring the major oil companies, the natural gas pipelines, major industrial users of natural gas, and the Federal Power Commission. Also featured, albeit in some-

what of a bit part, is the individual gas consumer, "the little lady at the burner tip". Although possibly suited for short subject treatment, this proceeding has now become a full-length feature of epic proportions. Basically it is this court's task to consider petitions for review of FPC Opinions 610 and 610-A, in which the Commission took jurisdiction over a formerly intrastate pipeline in Eastern Louisiana. There are many parties with numerous underlying themes to present. From this confusion we must review whether or not the FPC correctly handed out the awards.

In Opinion 610, the FPC found that due to the injection of interstate gas, the formerly intrastate pipeline known as the "Green System-East" was now subject to FPC jurisdiction. Despite all the many different methods used by the petitioners in stating the issues, there are basically only two points for us to consider in reviewing the Commission: (1) Was the FPC correct in holding that the Green System-East had become sufficiently interstate to confer exclusive federal jurisdiction? (2) Even if the system would be otherwise an interstate pipeline subject to jurisdiction, had Congress expressly withdrawn federal jurisdiction for a pipeline such as this by enactment of the Hinshaw Amendment to the Natural Gas Act?

Also, in Opinion 610, the FPC found federal jurisdiction over United's Purple System, another formerly intrastate pipeline. While the majority of the petitioners challenge only the existence of federal jurisdiction over the Green System, two petitioners, Cities Service and Gulf States Utilities, challenge the characterization of the Purple System as interstate. The nature of each of these pipelines will be considered separately below.

The Green System-East

The Green System-East, a natural gas pipeline owned by United Gas Pipe Line Company, is physically situated entirely within the State of Louisiana in United's New Orleans division. For several years prior to October 1, 1970, when United filed an application for FPC certification for the Green System-East, these facilities had been operated as an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. At this point it is necessary to note that the Green System-East is connected through systems of valves with other pipelines, including United's Black System which is an interstate pipeline. It appears that all the gas which goes into the Green System-East is produced in Louisiana gas fields, although at some point some of this gas may be carried in pipelines which also carry gas dedicated to the interstate market. There exists a heated debate as to whether any gas once placed in the Green System-East can or does ever leave the State of Louisiana. These factual matters are basic to the holding of jurisdiction and will be considered in detail *infra*.

Prior Proceedings

The Green System-East has been involved in a significant chain of court opinions. Petitioner, Louisiana Power & Light, previously brought suit in the United States District Court for the Western District of Louisiana seeking a determination of the intrastate character of the Green System-East. The district court, 332 F.Supp. 692 (1971), dismissed the suit, holding that the issue of the nature of the Green System-East was within the primary jurisdiction of the FPC.

On appeal, we reversed the district court, disagreeing that it was necessary to await Commission action. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326. This court went on to address the issue of the Green System-East's interstate character and held that any interstate gas which had been introduced into the system was so minimal in amount that federal jurisdiction had not attached.

In *Federal Power Commission v. Louisiana Power & Light Co.*, ____ U.S. ____, 32 L.Ed.2d 369 (1972), the Supreme Court reversed this court and agreed with the result reached by the district court. Noting that the FPC was conducting hearings of its own in this regard, the Court held that while the agency's decision would not be the last word, it must be the first. The FPC has now reached its decision, finding that the Green System-East is sufficiently interstate to be jurisdictional. It is that "first word" of the agency which we now must review and issue, if not the last word, at least the "next word".

I.

Before proceeding to the merits of the controversy, it is helpful to have a firm picture of the various parties engaged in this litigation and their respective interests in its outcome. It is also important to understand the practical effect of FPC jurisdiction on the parties.

The petitioners can be divided into basic groups. The major oil companies have an interest in the outcome both as sellers and purchasers of natural gas. Several smaller distribution companies which purchase gas from United and the Green System are also challenging the Commission decision. Of course, the petitioners include several state

regulatory agencies charged with the duty of regulating pipelines which are intrastate in nature. Public utilities which purchase natural gas for resale are involved as parties, as are various towns, parishes and municipalities, both as gas purchasers and representing the public interest. Basically, the effect of federal jurisdiction over the Green System-East will have a similar effect on each of these parties, although not to the same degree.

The petitioners, quite naturally, paint themselves as the heroes of this piece, denominating United as the villain and the FPC as conspiratorial bedfellow or, at the least, stooge of United. In giving depth to this characterization of United, the petitioners seek to show United as a greedy, over-reaching and somewhat callous corporate giant out to gorge itself at everyone's expense. The accuracy of this picture, they say, is made crystal clear by the results which will flow from FPC jurisdiction in this case.

These horrors which petitioners feel will flow from FPC jurisdiction are basically twofold. First, the switch from Louisiana Public Service Commission regulation, which, with regard to direct sales is virtually non-regulation, to FPC regulation will permit United to abrogate numerous long-term contracts which it has entered in the past for deliveries of gas to gas purchasers. The importance of this benefit can be seen immediately. Many of these contracts have several years yet to run. They were negotiated in the days when the supplies of natural gas appeared to be endless and, thus, contracts for extremely long terms, such as 20 years, were considered good business, sewing up a customer for the future. Of course, as we all know, with the rise of environmentalism which stressed the importance of natural gas as an essentially "clean" fuel and the realization that natural gas reserves and availability

have been drastically over-estimated, this country has been plunged into an "energy crisis". This "crisis" seems especially acute in the natural gas industry, possibly because of the greater demands for the fuel. Thus, what gas is available can be sold and indeed will be sold for substantially higher prices on today's market than a pipeline could realize under the old long-term contracts entered years ago. Even regulated prices would be substantially higher than the old contract rates, and it must be remembered that the FPC does not regulate the price of sales to direct customers such as large industries but only sales where ultimately the gas will be resold.

Secondly, the gas shortage has led to the necessary allocation of priorities and rationing of this limited supply of natural gas. Through what is popularly called "curtailment", pipelines are allowed to file, subject to Commission approval, plans of allocation of the available gas, basically to ensure that gas goes not to the highest bidder but to those who need it most in the public interest. FPC jurisdiction, thus, also brings in the almost certain result of curtailment of deliveries, even contractually agreed to deliveries. See *International Paper Co. v. Federal Power Commission*, 5 Cir. 1973, ____ F.2d ____ [No. 71-3531, slip opinion dated February 7, 1973].

The parties who sell gas to United for the Green System-East are also worried that if the Green System-East is held interstate they will be in a difficult contractual situation because the gas they are using to fill United's needs is restricted in many cases to the intrastate market only by contracts with those having the gas rights. Thus, they fear that they will have to use other gas to service the Green System-East.

Viewing this situation, the petitioners present United as out after the "fast buck". They allege that United was perfectly willing to be regulated, or in some cases not regulated, by the Louisiana Public Service Commission until it became evident to United that it was to its distinct financial advantage to come under FPC jurisdiction. They further suggest that to obtain Commission jurisdiction, United improperly and perhaps illegally injected interstate gas into the Green System-East, as it could do because of the interconnecting valves, solely for the purpose of creating an argument for jurisdiction to present to the Commission.

United, for its part, seeks to reverse these roles and cast itself as the "good guy". United presents a picture of greedy private industries wishing to gobble up all available gas for their own selfish use, to the detriment of other consumers and the public in general. United claims that any diversion of interstate gas into the Green System-East was because it was absolutely necessary to meet contract deliveries. United supports the Commission finding as in the best interest of the consuming public. Agreeing with United on this point, at least as far as its consumers go, is the Public Service Commission for the State of New York. New York intervened, alleging its fear that United would divert substantial amounts of gas dedicated to the interstate market, including New York consumers, to fill these Green System-East contracts unless the federal authorities exercised control.

Thus, the battle line is drawn and, as usual, the dispute is not over gas alone, but also money. In reviewing the Commission's opinion, we must put away these self-serving charges and countercharges and look to the legal issues of the requisites for federal jurisdiction. In light of the

Supreme Court's directive in *Louisiana Power & Light Co.*, supra, our task must begin with the FPC's decision.

II.

Opinions 610 and 610-A

The first question which the FPC faced in entertaining United's request was whether or not the Green System-East was indeed a jurisdictional pipeline. Noting that none of the interconnections at which United alleged interstate gas to have flowed into the Green System had been certificated by the Commission, the FPC stated that "the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the . . . facilities". In its presentation, United had marked a map of its system showing the points at which interstate gas had been injected into the Green System. The amounts of gas injected at each of these points, as found by the Commission, are set out in the margin.[1] Having found that gas which ultimately found its way into the Green System had at one time been transported in a pipeline which carried interstate gas even though all

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[1](b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated LiretteMobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

the gas was produced within Louisiana and had never physically been outside the state,[2] the Commission went ahead to decide whether or not the amount gave it jurisdiction.

The Commission found that the amounts involved were substantial and were sufficient to give the Commission jurisdiction. On peak days for 1970 and 1971 which were chosen, the Commission figures showed that 153,376 Mcf and 189,846 Mcf, respectively, flowed into the Green System-East. The Commission rejected a *de minimis* argument made by several of the petitioners stating that the interstate portion off the gas on peak days represented 7.79 percent of the requirements and on an annual basis, 2.39 percent of the requirement.[3] Several of the parties

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22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

[2]This is in dispute, but it is clear that some gas once carried in the Green System-East ends up in an *interstate* pipeline owned by Mid-Louisiana, but in all probability this gas does not physically leave Louisiana.

[3]Adjustments raise these figures to 10.7% and about 3.4%, respectively.

dispute these findings made by the Commission, especially the holding as to the total amount introduced into the Green System-East. We will discuss these points in more detail later in the opinion.

Viewing the total picture presented by all the various factors in the record before it, the FPC found that the Green System was an integrated part of United's interstate (or Black) system and that the Green System-East could no longer be left to state regulation as a purely intrastate pipeline. We note that the Commission somewhat retreated from its suggestion that Green System gas flowed out of the State of Louisiana in a physical form. In Opinion 610-A, the FPC stresses that its finding that Green System gas is introduced into Mid-Louisiana's pipeline is simply to show that it is commingled with gas which has moved in interstate commerce. This factor, according to the FPC, gives support to its holding that the Green System has become integrated with interstate systems even though the gas itself never flows out of the state.

The FPC went on to hold that jurisdiction was not to be determined by the amounts of gas involved. They held that jurisdiction attached wherever even an infinitesimal amount of interstate gas was injected into the system. For these purposes, the Commission defines interstate gas as any gas which had ever been carried in a certificated interstate pipeline.

Section 1(c) of the Natural Gas Act, commonly known as the Hinshaw Amendment, provides an exemption from federal regulation wherever all the gas received by the system is to be consumed wholly within the state. The

Commission refused to apply the Hinshaw exception, apparently finding that the Green System-East was an integrated facility and part of the United's total system.

Relying on *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), and this court's Florida Parishes opinion, *Louisiana Public Service Commission v. FPC*, 5 Cir. 1966, 359 F.2d 525, the FPC held that there had been sufficient commingling of intrastate and interstate gas to require that the Commission take jurisdiction over the Green System-East. The Commission also expressly rejected the argument that United had illegally and improperly introduced interstate gas into the Green System-East. First, it found the amounts injected were necessary to meet contract commitments, but, more importantly, stated the existence of jurisdictional facts controlled no matter what the motive.

Commissioner Carver dissented from Opinion 610. His primary reason for dissenting was his feeling that this circuit's opinion in *Louisiana Power & Light v. United Gas Pipe Line Co.*, 456 F.2d 326, which had not yet been passed on by the Supreme Court, was controlling and that the Commission was bound by *res judicata*. In his remarks, Commissioner Carver criticized the Commission for failure to take account of what he felt were the obvious reasons that United was now seeking Commission jurisdiction. He pointed out that the long-term industrial contracts were no longer beneficial to United because of the low rate structure and impending supply crisis. He also referred to the protected curtailment that United had previously sought from the Commission. See *International Paper Company v. FPC*, 5 Cir. 1973, ... F.2d ....., [No. 71-3531, slip opinion dated February 7, 1973]. He further stated:

> Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands.

Following the petitions for rehearing, the Commission issued Opinion 610-A. In this opinion, the Commission retreated somewhat from its conclusion that Green System-East gas flowed out of the State of Louisiana. The Commission also attempted to clear up several other statements in Opinion 610 which were questionable. Commissioner Carver again dissented. He points out that the retreat as to Green System-East gas flowing out of the State of Louisiana undermined the entire finding of jurisdiction. Furthermore, he objected to the majority's use of "official notice" in considering flow charts not made a part of the record in the case without giving the parties an opportunity to present analysis of those flow diagrams. Commissioner Carver concludes that the interstate gas which does flow into the Green System-East is so minimal and insignificant that the Commission should not take jurisdiction.

III.

At the outset, we note that the FPC has apparently decided to treat the entire Green System, formerly known as Green System-East and Green System-West, as a single unit for purposes of determining the existence of federal jurisdiction. In the past the Green System-East has been that part of United's New Orleans division facilities lying east of United's Napoleonville-Kosciusko interstate pipeline system. There is no abrupt stopping point for Green System gas when it reaches the Napoleonville-Kosciusko line; it simply continues to flow on toward the Baton

Rouge area, but with the pipe denominated the Green System-West. Apparently this artificial division has been allowed to exist unchallenged for a number of years. In the past this one continuous pipeline has apparently been treated, for certification purposes, as two separate entities. The Green System-West has long been certificated while the Green System-East has been considered totally intrastate. As Commissioner Carver points out in his dissent to Opinion 610:

> However, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit, free of Federal regulatory impact, and free to contract in any manner it chose, consistent with State law.

In Opinion 610, however, the FPC indicates that at this time the whole New Orleans facility, the entire Green System, must be considered as a unit.

The FPC, in finding jurisdiction, relies heavily on the fact that gas which must be denominated interstate gas flows into and out of the Green System. The flow charts used by the Commission for the year 1969 show that 5,419,519 Mcf of gas were supplied from interstate lines into the Green System-East, that part of the Green Sys-

tem east of the Napoleonville-Kosciusko line. Aside from a minuscule and irregular injection of less than 14,000 Mcf at Point "K", this entire volume of gas was injected at Points "I" and "J". The FPC found that this gate was interstate in nature because it was taken from a commingled stream of gas designated for the interstate market. Both Points "J" and "I" present similar factual situations since they both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading to United's interstate system, the other into the Green System-East.

The Commission also held that substantial quantities of interstate gas were delivered into the Green System at Points "L" and "M", which are both located west of the Napoleonville-Kosciusko line in the Green System-West. At Point "L" over 38,000,000 Mcf is delivered into what is known as the Willow Glen Loop. This loop is also supplied with almost 7,000,000 Mcf directly from the Green System-West and it should be noted that this exit for Green System gas is located very close to the alleged breakpoint between the Green System-East and the Green System-West and that this injection of almost 7,000,000 Mcf is over three-fourths of the total volume which the so-called Green System-East delivers to the so-called Green System-West. At Point "M", the Napoleonville-Kosciusko line delivers approximately 2,000,000 Mcf into the so-called Green System-West. This 2,000,000 Mcf joins with the almost 2,000,000 left after delivery to the Willow Glen Loop and, with various further receipts and deliveries in the so-called Green System-West, continues on to the end of that pipeline for exchange into Mid-Louisiana's interstate pipeline for transportation and sale within the Baton Rouge area. It should be noted that the

Mid-Louisiana line contains interstate gas flowing in from Mississippi.

Based on these injections and comminglings of interstate gas into and within the Green System, the Commission found that it had jurisdiction over the entire system. In its opinion, the FPC noted that, even without consideration of Points "L" and "M", after adjustments, about 3.4% of the Green System-East's annual requirements were supplied from these interstate gas sources. For the peak day of January 6, 1970, the adjusted figures did show that 10.7% of the flow into the Green System-East facilities was injected from interstate gas. The Commission expressly found that these quantities are not *de minimis*. The Commission expressly found that without these injections of interstate gas there would have been a serious deficiency to serve the New Orleans area. Furthermore, the Commission found that this deficiency will seriously increase in the next few years, especially during the peak winter months, with the result that more and more interstate gas would have to be diverted to satisfy commitments. Thus, the Commission has explicitly held that the interstate injections are not minimal in amount nor are they of a temporary nature. Rather, the Commission feels that the amounts were significant, especially on peak days, and that continued delivery of interstate gas will be necessary to fill contractual obligations on the Green System-East.

Several, but not all, of the petitioners attack the Commission's use of a commingling theory based on *People of the State of California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC v. Amerada Petroleum Corporation*, 379 U.S. 687 (1965); and most especially, our decision

in *Louisiana Public Service Commission v. FPC*, 5 Cir. 1966, 359 F.2d 525 (commonly called Florida Parishes). In seeking to distinguish these cases the petitioners rely on this court's opinion in *Louisiana Power & Light Company v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326, in which we held that "the flow of gas from the Black System into the Green System in the case at bar is occasional and irregular as well as minimal". Id. at 339. The petitioners stress that our conclusion in that case was based on substantially the same evidence presented to the Commission and that we must now reach the same result.

As previously noted, the Supreme Court vacated that part of our opinion referred to above which held that there was no FPC jurisdiction over the Green System-East. 32 L.Ed.2d at 389. The Court held that the determination of jurisdiction was for the FPC in the first instance with our role limited to the normal processes of judicial review under the Natural Gas Act.

The Federal Power Commission was set up by Congress to bring a degree of regulatory expertise to the problems of regulating the transportation and consumption of natural gas, as well as other forms of energy. Because of their familiarity with the area in which they operate, the Commissioners are able to make substantially more accurate judgments than courts would be. Here the Commissioners have found that the injections of gas of an interstate character are not minimal and irregular, but are indeed substantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments. Because of our prior holding, it is almost certain we would not reach the same conclusion as an initial matter. However, ours is not to substitute our judgment for that

of the FPC on an issue where that body's intimate knowledge of the specific problems is concerned. We feel that determinations as to the amounts and constancy of the flow and their characterization in terms of impact and necessity therefor, once made by the Commission, cannot be lightly set aside by a court. In *Louisiana Power & Light* we were admonished by the Supreme Court to give the Commission the first chance to determine its jurisdiction in this case. The Commission has found that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. In making this latter determination, the Commission expressly considered and rejected the position of this court in *Louisiana Power & Light* as it applied to the facts found. Disagreeing with our holding that the injections were minimal, the FPC pointed out that the peak day injections were sufficient to heat over 100,000 homes. Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, Administrative Law Treatise §30.05.

Among other things, the Commission found that any amount of interstate gas would give jurisdiction. The opinion seems to suggest that one molecule would be sufficient to automatically confer federal control. We do not reach or consider that issue in this opinion. It appears to this court that there would clearly be times when the amounts of natural gas involved would be so irregular and minimal that Commission jurisdiction would be absurd. However, as noted, the Commission has found that such is not the case as to the Green System-East and we find that to reverse the Commission on this point would simply

be substituting our own judgment for that of the Commissioners, a luxury that we do not possess under our limited review.

Thus, we find we must sanction those parts of the FPC's Oponions 610 and 610-A which establish federal jurisdiction over the Green System as an interstate pipeline. We are somewhat troubled by the assertion of Commissioner Carver and several of the petitioners concerning United's motive in obtaining FPC jurisdiction. However, we do not feel that we have any available way to step in and sort out the competing inequities and reach what would be the fairest result for all concerned. That is the job for the Commission, and it is for the Commission to decide how to balance competing equities or how to penalize "unclean" parties in appropriate cases.

We would point out that federal regulation is not to be considered a plaything to be turned on and off to suit a pipeline's financial advantage. We feel confident that the FPC would not allow itself to be so used and are certain that courts would not allow such a practice to continue. Despite the innuendo and insinuation in this case, we see no direct evidence to support these suggestions of improper motive and conduct.

IV.*

The Hinshaw Amendment

Section 1(c) of the Act (the "Hinshaw Amendment") describes certain persons and facilities whose participation in the transportation and sale of gas in interstate commerce is "primarily of local concern and subject to regula-

*Judge Bell authored Part *IV. The Hinshaw Amendment*, for the court.

tion by the several States". 15 U.S.C. § 717(c). Under § 1(c) these persons and facilities are exempt from the jurisdiction of the Commission.[4]

In the proceedings before the Commission the petitioners maintained that even if the gas transmitted through the Green System-East were interstate in character, the Commission would not have jurisdiction over it because the Green System-East falls within the provisions of § 1(c). The Commission held that the Green System-East is not an exempt facility within the meaning of that section. The petitioners contend this holding was erroneous. We disagree.

Congress enacted the "Hinshaw Amendment" to preserve state control over local distributors who purchase gas from interstate pipelines.[5] Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems.

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[4]The text of the provision is the following:

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulations by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

[5]The amendment was necessary because of an early decision of the Supreme Court which, in construing the scope of the Commission's jurisdition over the transportation and sale of gas "in interstate commerce", held that interstate gas does not lose its interstate character in the hands of local distributors who buy gas for resale and ultimate consumption within the state. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268. (1950).

We discern this intent in the legislative history. During the debate in both houses, supporters of the measure were at pains to emphasize that the proposed exemption was not for the benefit of interstate pipeline companies. See, e.g., 99 Cong. Rec. 10569-70 (remarks of Congressmen Hinshaw, Harris, and Yates). Critics of the measure suggested that the exemption would provide interstate pipelines with a means of defeating federal jurisdiction over portions of their operations which deliver gas for consumption wholly within a single state. One senator suggested that if an interstate pipeline placed one of its state-wide delivery systems under the control of a wholly owned subsidiary and delivered gas to the subsidiary at the state line, the local system would qualify for exemption under the terms of the bill. See 100 Cong. Rec. 3173 (remarks of Senator Burke). Senator Bricker, one of the sponsors of the bill in the Senate, vehemently denied this:

> "[T]here is no intent to place any pipeline company outside the jurisdiction of either the Interstate Commerce Commission or the Federal Power Commission.
>
> "As soon as such a pipeline company were formed, it would come within the jurisdiction of the Federal Power Commission.
>
> "This measure is not an effort — and I make this statement for the RECORD — to remove such companies from the jurisdiction of the Federal Power Commission. If such an interpretation is made, it is without basis or support or foundation upon anything stated at any of the committee hearings." *Id.*

The congressional intent not to exempt local segments of integrated interstate pipeline systems from regulation by the Commission finds clear expression in the language of the statute. Thus, under § 1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be consumed within a given state or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same "person".

In the present case we are not called upon to define with precision the degree of independence that must exist between the person who gives and the person who receives gas at or within state lines in cases where the exemption is warranted. Nor need we consider the propriety of the Commission's prior determinations with regard to the availability or non-availability of the exemption in other cases. Under any plausible reading of the "other person" requirement, the Commission's determination in this case must be sustained.

By virtue of the flow of interstate gas from the Black System into the Green, the Green System-East has ceased to be an intrastate facility and has become, instead, a local branch of an integrated interstate pipeline. In all its

relevant parts, this pipeline system is operated by one person: United. At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points — the points at which the exemption must take effect, if at all — the "person-to-person" requirement simply is not met.

Petitioners contend, however, that the requisite exchange from one person to another need not occur at the points where the exemption must take effect. They say that the person-to-person requirement may be satisfied by exchanges occurring at other points in the network of distribution or supply. Specifically, they claim that in this case the requirement may be satisfied by various exchanges that occur between the Black System and certain independent procedures "upstream" of the points of connection between the Black System and the Green, or by various exchanges between the Green System and certain independent intrastate producers "downstream" of these points of connection.

The legislative history makes it clear, however, that in the contemplation of the supporters and the critics of § 1(c) the exchange between the two persons described in the statute took place at a point where an exemption was necessary to protect the receiver from federal jurisdiction that would otherwise exist under the *East Ohio* decision.[6] In other words, the point of the person-to-person exchange was a point where exemption was needed, and it was the point where the proposed exemption was to take effect. See the Senate and House debates, *supra*.

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[6]See Footnote 5.

Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green System-East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the points of connection between the Black System and the Green — the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

The logic of a technical requirement that identifies the point of exemption with the point of the requisite exchange is apparent on the facts of this case. The contributions by independent producers of interstate gas downstream of the points of connection between the Black System and the Green, or the contributions of interstate gas upstream of these points, do nothing to change the fact that the Green System is now a local branch of an integrated interstate system. Given Congress' overriding intent not to bifurcate the regulation of such system, these contributions should not enhance the Green System's eligibility for exemption under § 1(c). Under our interpretation of the person-to-person requirement, they do not.[7]

The Purple System

The "Purple System" is a pipeline system in United's Lafayette district in southwestern Louisiana. This pipeline system, like the Green System-East, has long been considered an intrastate pipeline not subject to Commis-

[7]Because we decide the Hinshaw issue on this ground, we need not consider the other grounds asserted by the Commission as a basis for its refusal to recognize the allegedly exempt status of the Green System-East.

sion jurisdiction. Two parties, Cities Service Oil Company and Gulf States Utilities Company, challenge the FPC's holding of federal jurisdiction over the Purple System.

The FPC, without dissent as to these facilities, made specific findings showing that the Purple System is unquestionably an integrated part of United's interstate system. At Point "A", United obtained gas for the Lafayette facilities by exchange with an interstate transmission line of Texas Eastern Transmission Corporation. At Point "B" on the system map, United obtained over 1,000,000 Mcf on an annual basis from an interstate line of Texas Gas Transmission Corporation. At Point "C" on the flow chart, United delivered, on an annual basis, over 24,000,000 Mcf to Penzoil Pipeline Company for transportation across the Louisiana line into Texas. At Point "D", United received over 1,000,000 Mcf from Tennessee Gas Pipeline Company's interstate pipeline. At Point "H", over 16,000,000 Mcf were supplied into two streams, with a little over one-half being delivered into one of United's interstate pipelines for transportation out of the state, and the remainder used in the intrastate system. Finally, at Point "O", Tennessee delivered over 22,000,000 Mcf on an annual basis to United's Purple facilities which were commingled with locally produced gas and use in the Lake Charles area.

These facts amply establish that the Purple System is an integrated pipeline facility with many connections and exchanges of gas with interstate facilities. Gas clearly flows out of this system for interstate markets at Point "C". Significant volumes of gas from interstate facilities are introduced into the Purple System for local sale.

Cities Service attempts to distinguish the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases by stating that all the facilities used for transportation for delivery to Cities Service at its refinery are located in Louisiana and all of the gas used at the Cities Service plant originates at production points or exchange points within Louisiana. Cities Service alleges that this makes the pipeline system purely intrastate.

On the contrary, we feel the evidence clearly establishes that this Purple System is part of an integrated pipeline network involving significant transportation of interstate volumes. We feel that the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases cannot be distinguished successfully. We will not "lop off" certain parts of the otherwise integrated system to create an artificial intrastate pipeline.

For the reasons set forth above, the result reached by the FPC in Opinions 610 and 610-A with regard to jurisdiction over the Green System and Purple System is

AFFIRMED.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1972

Nos. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

FPC No. CP71-89
LOUISIANA POWER & LIGHT COMPANY, and
TEXACO, INC. and
CITIES SERVICE OIL COMPANY, ET AL,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

On Petitions to Review and Set Aside Opinions and
Orders of the Federal Power Commission

Before BROWN Chief Judge, BELL and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Louisiana Power & Light Company and Texaco, Inc., and Cities Service Oil Company, Et Al for review of orders of the Federal Power Commission of the United States, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the Federal Power Commission are hereby affirmed:

It is further ordered that petitioners pay to respondent-intervenor, United Gas Pipe Line Company the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1973

Issued as Mandate:

Denial of Rehearing of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185, and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and
TEXACO, INC., and
CITIES SERVICE OIL COMPANY
ET AL.,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion June 28, 1973, 5 Cir., 1973, ____ F.2d ____).

(September 5, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

Opinions of the Federal Power Commission

DC-51

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
John A. Carver, Jr.,
Albert B. Brooke, Jr.,
Pinkney Walker, and
Rush Moody, Jr.

United Gas Pipe Line Company

Docket No. CP71-89

OPINION NO. 610

OPINION AND ORDER FINDING JURISDICTION AND REMANDING PROCEEDING FOR RECEIPT OF ADDITIONAL EVIDENCE

(Issued February 9, 1972)

NASSIKAS, Chairman:

1. United Gas Pipe Line Company (United) filed on October 1, 1970, an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing certain operations, sales and services. Specifically, United seeks to have added to its existing certificated system two large service areas in Louisiana and a few sales for resale and services in Texas. United avers that it now seeks to obtain a certificate authorizing the aforementioned operations, sales, and services because of the Commission's holding in the *Florida Parishes* case[1] to the effect that the commingling in transmission facilities of gas moving in interstate commerce with local or intrastate gas makes the operation of the facilities, as well as the sales and services rendered by means of such facilities, subject to the Commission's jurisdiction.

2. A hearing was held in this proceeding from June 7,

[1] *United Gas Pipe Line Co.*, 30 FPC 569 (1963), *aff'd sub nom. Louisiana Public Service Commission v. F. P. C.*, 359 F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966).

1971, through June 18, 1971.[2] At the conclusion of the hearing United moved for omission of the intermediate decision procedure and that motion was granted by the Commission's order issued July 2, 1971. Thereafter, 17 parties filed initial briefs and 16 submitted reply briefs.[3] Since this order is in the nature of an interim decision pending the receipt of additional evidence upon remand, which we order herein, the arguments of the parties will not be referred to herein except in a few minor respects. The oral arguments requested by some parties are denied because the deficient record would make the holding of oral argument nonproductive at this stage of the proceeding.

JURISDICTIONAL ISSUE

3. The first issue to be resolved is whether the Commission has jurisdiction over the operation of the facilities involved and over the sales and other services being rendered by means of such facilities. That question must be determined on the basis of the gas flow in the areas concerned as shown by the evidence.

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[2]The following parties have intervened in the proceeding: Algonquin Gas Transmission Company; Boise Southern Company; The Parish of Cameron, Louisiana; Town of Carencro, Louisiana; Cities Service Oil Company; Consolidated Gas Supply Corporation; Gulf States Utilities Company; Humble Oil & Refining Company; Laclede Gas Company; State of Louisiana; Louisiana Gas Service Company; The Louisiana Municipal Association; Louisiana Power & Light Company; The Louisiana Public Service Commission; Mid-Louisiana Gas Company; The Public Service Commission of the State of Missouri; Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; Monsanto Company; National Gypsum Company, Scott Paper Company and Stauffer Chemical Company; The City of New Orleans, Louisiana; New Orleans Public Service Inc.; The Public Service Commission of the State of New York; The Ohio Fuel Gas Company and The Manufacturers Light and Heat Company; Shell Oil Company; Southern Natural Gas Company; Texaco Inc.; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Towns of Walker and Livingston, Louisiana; and United Gas, Inc.

[3]On November 2, 1971, the State of Louisiana, Louisiana Municipal Association and Parish of Cameron, Louisiana, filed a motion for permission to file a late reply brief submitted therewith. We have accepted the brief for filing and have considered the arguments made therein.

(1) *Description of Texas Facilities, Sales, and Services*

4. United's evidence shows that it has already received a certificate from the Commission authorizing the construction and operation of all the transmission facilities which it owns and operates in its Victoria Division of Texas. The Victoria Division extends along the Texas Gulf Coast from a point near Agua Dulce to a point northwest of Houston. United's testimony shows that it has never obtained a certificate authorizing the sale of gas from the Victoria Division to distributors which resell the gas in 14 communities, nor has United ever obtained a certificate authorizing it to deliver gas to the 7 direct industrial customers which it serves from its facilities in the Victoria Division.

5. United's flow diagram show that United has a single integrated pipeline system in the Victoria Division. Gas is delivered into the system from numerous gas fields and travels out of the State of Texas in interstate commerce except for deliveries made from the interstate facilities to the 14 communities and 7 direct-sale customers which United seeks authorization to serve.

(2) *Determination of Jurisdiction Regarding Victoria Division*

6. There appears to be no doubt but that the Commission has jurisdiction over the 14 sales for resale and the transportation and delivery of gas to the seven direct-sale customers of the Victoria Division. In *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965), the Supreme Court affirmed the Commission's assertion of jurisdiction over the sale and transportation of gas in *Montana-Dakota Utilities Co.*, 30 FPC 200 (1963). In the *Amerada* case the interstate pipeline company purchased gas at the tail-

gates of three gasoline plants within the State of North Dakota and commingled in the same pipeline gas which was contractually destined for use only within the State with gas purchased from the three plants for use outside of the State. The Commission held that the commingling of the so-called intrastate gas with the gas moving out of the State converted all the sales from the gasoline plants into sales for resale in interstate commerce subject to the jurisdiction of the Commission. In the *Florida Parishes* case *supra* the Commission stated that "* * * The removal of a portion of the gas thus flowing in interstate commerce does not change the gas removed from the stream into intrastate gas" (30 FPC at 563).

7. Since the evidence in this proceeding shows that United purchases gas from many sources for transportation and resale in interstate commerce and commingles the gas traveling to markets outside the State with gas delivered to customers within the State, all sales for resale and deliveries to direct-sale customers within the State are subject to the Commission's jurisdiction under the rationale expressed by the Commission in the *Florida Parishes* and *Amerada* cases.

8. However, the Commission at this time does not believe it would be in the public interest to grant a certificate with respect to the Victoria Division because United's evidence is unclear in some respects. Specifically, United did not make it clear in its exhibits whether it is now rendering some service pursuant to Commission authorization and wishes to have additional sales for resale and services certificated, or whether it is now rendering no service in the Victoria Division pursuant to Commssion orders and now wishes to obtain a certificate covering all sales for resale and services being performed in the Victoria

Division. United's evidence should also clarify whether sales to pipeline companies shown on the flow diagrams have been certificated, whether any of the other deliveries shown on the flow diagrams have heretofore been certificated, and whether the flow diagrams reflect all services and sales being rendered, or only those for which a certificate is requested. United's evidence in the remanded proceeding should show whether the Victoria sales and services have heretofore been included as requirements to be met when presenting gas reserve and deliverability data to the Commission in certificate cases or in the preparation of its Form 15. Additionally, United should present evidence with respect to alternate sources of gas supply for the Victoria customers.

(3) *Description of Louisiana Facilities, Sales, and Services*

9. The certificate which United seeks for Louisiana facilities, sales, and services would not only cover authorization to make sales for resale and deliveries of gas to direct-sale customers, but would also grant authority to operate the facilities by means of which such sales and services are rendered.

10. The facilities involved are situated in that portion of United's service area known as the New Orleans Division which is located entirely in Southern Louisiana south of Marksville, Louisiana. The New Orleans Division is further subdivided into two districts called the Lafayette District and the New Orleans District. The Lafayette District lies in the western part of Southern Louisiana west of Baton Rouge and Napoleonville, while the New Orleans District is situated in the eastern part of Southern Louisiana and includes Baton Rouge and Napoleonville.

11. Since United operates an existing interstate pipeline system in Southern Louisiana under certificates issued by the Commission as well as the facilities comprising the Lafayette and New Orleans Districts, United's evidence includes maps which use three colors to differentiate the various facilities and service areas. The certificated transmission lines are shown in black, the Lafayette District facilities are depicted in purple, and the New Orleans facilities are outlined in green. Throughout this opinion the purple facilities will be referred to as the Lafayette facilities and the green facilities will be referred to as the New Orleans facilities. United's application requests that the Commission certificate the Lafayette and New Orleans facilities and all sales and services rendered by means of such facilities.

12. Although United's Exhibit 1 shows letter designations from "A" through "W" to indicate that there are 24 points where interstate gas enters the Lafayette and New Orleans facilities, none of those interconnections has ever been certificated by the Commission. Thus, the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the Lafayette and New Orleans facilities. Diagrams showing the flow of gas on an annual basis (for the 12 months ending December 31, 1969) were presented by United in support of its belief that the Lafayette and New Orleans facilities are now integrated with its interstate system. The Commission has examined both the annual flow diagrams and the flow diagrams for the peak day of January 6, 1970, which were received in evidence as Item E (Tr. 558). In addition, the Commission has taken official notice of United's flow diagrams for the peak day of March 3, 1971, which were filed July 7, 1971, pursuant to Section 260.8

of the Commission's Regulations under the Natural Gas Act.

13. While United's Exhibit 1 shows 24 points indicating where interstate and uncertificated gas supplies may be commingled, scrutiny of the 12 points which were discussed in the cross-examination of United's witnesses is sufficient to establish that the operation of United's Lafayette and New Orleans facilities are presently subject to the Commission's jurisdiction.

(a) *Flow of Interstate Gas in Lafayette Facilities*

14. At point "A" on Exhibit 1 there is an interconnection between an interstate transmission line of Texas Eastern Transmission Corporation and a Lafayette pipeline lying north of the City of DeQuincy. Since this interconnection is a point at which United exchanges gas with Texas Eastern, the flow diagram shows no annual volumes to be entering United's system, but on the peak day of March 3, 1971, Texas Eastern delivered 105,173 Mcf of which approximately half traveled southeasterly toward the Lake Charles area and the remaining volume was transported northwesterly into the Leesville area.

15. Point "B" on Exhibit 1 is located at an interconnection between Texas Gas Transmission Corporation's interstate line and a Lafayette pipeline near Iowa, Louisiana. On an annual basis Texas Gas delivered 1,371,681 Mcf to United at that point and on the peak day of March 3, 1971, United received 17,636 Mcf from Texas Gas at that point. The gas was commingled with intrastate gas and sold to customers in the Lake Charles area.

16. Point "C" is located on the western boundary of the State of Louisiana southeast of Beaumont, Texas. At that place a Lafayette pipeline interconnects with Pennzoil

Pipeline Company's facilities which transport gas into Texas. On an annual basis 24,254,556 Mcf are delivered to Pennzoil and on the peak days of March 3, 1971, and January 6, 1970, volumes of 1,075 Mcf and 58,399 Mcf, respectively, were delivered to Pennzoil for transportation out of the State of Louisiana.

17. At point "D" United receives gas in the East Cameron Area from Tennessee Gas Pipeline Company's interstate pipeline and such gas is transported along with locally-produced gas to consumers in the Lake Charles area. On an annual basis Tennessee delivered 1,357,396 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 24,079 Mcf and 41,323 Mcf, respectively.

18. At point "H" gas produced in the Lawson field area is delivered into a pipeline extending from Lafayette to Bancroft. Although all of the gas received at this point is produced in Louisiana, the gas is split at the point of delivery so that out of 16,594,766 Mcf received on an annual basis, 9,717,494 Mcf are transported easterly for delivery into one of United's interstate pipelines transporting gas out of the State, while the remainder is transmitted to a market in the Leesville area. On the peak day of March 3, 1971, 38,138 Mcf entered the line and all of it was transported out of the State. Of the 38,429 Mcf delivered from the Lawson field on the peak day of January 6, 1970, 21,395 Mcf were transported out of the State while the remainder was consumed in local markets.

19. At point "O" Tennessee delivers gas to United from its interstate line near Iowa, Louisiana. On an annual basis Tennessee delivered 22,138,127 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 47,919 Mcf and 117,173 Mcf, respectively. The

gas is transported by United with locally-produced gas and consumed by customers in the Lake Charles area.

(b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the

peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

(c) *The Unauthorized Gas Flows Establish Jurisdiction*

26. The foregoing description of the flow of interstate gas in United's Lafayette and New Orleans facilities shows beyond any doubt that United's introduction of substantial quantities of gas into those uncertificated facilities from its interstate gas sources is a suffcient commingling of

interstate and uncertificated gas supplies to bring the operation of the Lafayette and New Orleans facilities, together with the sales and services made from those facilities, within the Commission's jurisdiction under the Natural Gas Act.

27. As indicated in the foregoing discussion of delivery points, on the peak days of 1971 and 1970, interstate volumes of 189,846 Mcf and 153,376 Mcf, respectively, flowed into the New Orleans District facilities. Those volumes would be adequate to heat well over 100,000 single-family residences on a cold day.

28. A *de minimis* argument is advanced by certain parties with respect to commingled gas in that portion of the New Orleans District, referred to as the Green System-East, located east of the Napoleonville-Kosciusko line. New Orleans Public Service Inc. (NOPSI) offered Exhibit 22 showing that deliveries of interstate gas by United into Green System-East represented 7.79 percent of peak-day requirements and 2.39 percent of annual requirements for the 12 months ended July 31, 1970.

29. A comparison of the adjusted flow diagrams upon which Exhibit 22 is based[4] with United's actual flow data on file with Commission, referred to previously, shows that the actual peak-day deliveries from gas supply sources differ from the adjusted flows in almost every instance.

30. At Bastian Bay (point "I") where interstate gas entered the Green System-East the actual volumes shown for the peak day, January 6, 1970, exceeded the adjusted flow by 19,489 Mcf. This increases the percentage of peak-

[4]Exhibit 22 indicates that the source for the data shown therein was United's response to FPC Staff Request No. 38 in Docket No. RP71-41, prepared for United's rate proceeding in that docket, which consisted of flow diagrams captioned "adjusted".

day injections of interstate gas into the Green System-East from 7.79 percent to 10.7 percent. A review of the same data with respect to the annual volumes of interstate gas flowing into the Green System-East indicates that the 2.39 percent should be increased to about 3.4 percent. We find that these quantities are not *de minimis*.

31. Furthermore, United projects the peak-day demand in the New Orleans-Baton Rouge area to be at a level of 1,002,000 Mcf during the 1971-72 winter period with a projected intrastate supply of only 413,000 Mcf (Tr. 91-92). Accordingly, United shows that there is a peak-day deficiency in gas supply 598,000 Mcf which is contends must be supplied by interstate sources. On the basis of this evidence, there would be a substantial gas supply deficiency in the City of New Orleans area, within the Green System-East, of approximately 448,000 Mcf per day during the 1971-72 winter heating season which would be met with volumes from interstate sources transported through certificated interstate facilities. Moreover, United contends that this deficiency[5] will increase for the peak day of the 1972-73 winter heating season and that it will be necessary for United to increase its deliveries into the Green System-East if that system is to remain on a parity with all other systems.[6]

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[5]A question has been raised as to whether a producer affiliate of United has gas available, which can be delivered into either interstate or uncertificated facilities, in sufficient quantities to meet the New Orleans District's deficiencies and thereby obviate the need for United to obtain gas from its interstate sources. Even assuming that the Commission sanctions such an arrangement we find no evidence to support that proposition; to the contrary the evidence in the record indicates that on peak days gas from interstate sources in volumes of about 600,000 Mcf will have to be introduced into the New Orleans District. To test the possibility of obtaining gas in those quantities from Lirette sources, we have examined both the Form 15 and System Flow Diagram reports filed pursuant to our regulations. The data from those sources show that the peak-day flows from Lirette to *any* destination would fall short of meeting the requirements by several hundred thousand Mcf.

[6]See also Exhibits 3 and 34.

32. Mr. Echterhoff testified at Tr. 91-92 that the peak-day deficiency of intrastate reserves for meeting the needs of the New Orleans District would be 684,000 Mcf in 1972-73, *i.e.*, the requirements were 1,018,000 Mcf and the "intrastate" reserves were 334,000 Mcf. Thus, 67.2 percent of the peak-day requirements would have to come from *interstate* sources.

33. If the Green System-East (or New Orleans area by itself) is isolated from the Willow Glen-Baton Rouge area, the needs for the New Orleans area by itself amount to 542,000 Mcf. The deficiency would be made up by obtaining interstate gas from the Bastian Bay-Lirette-Mobile system.

34. Testimony in the record of the case reveals that the peak-day deficiency on the Green System would result in approximately 70 percent curtailment of the Green System, including the New Orleans distributor — the company upon which human needs customers depend. To test this testimony, we have taken notice of the filings required by our regulations.

35. The peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations as well as the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities. We examined the peak-day flow diagrams for several reasons. First, it is important in this proceeding to understand the impact on United's existing interstate customers resulting from deliveries of gas to the New Orleans and Lafayette Districts on peak days because those volumes are illustrative of the extent of curtailments to United's existing customers which will be necessary in

order for the uncertificated markets to be served on cold days. Second, Section 157.14(a)(8) requires the submission of peak-day flow diagrams as a part of all certificate applications in order to show the applicant's ability to serve its proposed customers on the day of maximum demand. Third, the Commission normally examines peak-day flows in determining jurisdiction. See, *e.g.*, *Florida Parishes*, *supra*, 30 FPC at 564, and *Amerada*, *supra*, 30 FPC at 203. Fourth, some of the parties had relied on Exhibit 22 showing peak-day flows based on flow diagrams which were introduced in United's rate proceeding in Docket No. RP71-41, and it was appropriate that the Commission examine peak-day flow diagrams which reveal actual flows of gas on the peak day rather than the adjusted flows which were utilized in the flow diagrams submitted in the rate proceeding.

36. We have examined all available data in finding that the uncertificated facilities, as well as the sales for resale and transportation services rendered thereby, are subject to the Commission's jurisdiction. In addition, the annual flow diagrams which were a part of the record reveal that gas flows out of the Green System-East.

37. The testimony (Tr. 326) indicates that point "M" is at the extreme west end of the Green System-East. At that point 8,256,920 Mcf left the Green System-East and entered the Green System-West and of that volume 6,879,259 Mcf were transported toward Willow Glen while the remaining 1,377,661 Mcf were transported toward Baton Rouge and commingled with 2,055,759 Mcf of interstate gas delivered into the Green System-West from the Napoleonville-Kosciusko interstate pipeline. The commingled stream of Green System-East and interstate gas there-

after was used to serve markets in Louisiana and ultimately provided 2,054,190 Mcf at point "U" for delivery to Mid Louisiana Gas Company's interstate pipeline which extends out of the State of Louisiana.

38. The importance of examining both annual and peak-day flow diagrams becomes obvious from the foregoing illustration because the peak-day flow diagram for March 3, 1971, shows that 22,811 Mcf were transported out of the Green System-East into the Green System-West but were thereafter commingled with interstate gas and wholly used in the Willow Glen area. Although 38,557 Mcf were delivered to Mid Louisiana on that day at point "U", none of the Green System-East gas is shown to be flowing beyond the Willow Glen pipeline. Of course, gas does flow out of the Green System-East on both a peak-day and an annual basis, but the Green System-East gas does not appear to flow out of the State of Louisiana except on an annual basis.

39. We have considered the volumes delivered at all points in our discussion with respect to the flow of gas in the Lafayette and New Orleans Districts. Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities. It is unnecessary for us to separate interconnection points in the Green System-East from those related to the Green System-West because the New Orleans District is situated in the eastern part of Southern Louisiana and *includes* Baton Rouge and Napoleonville.

40. As previously stated, we have considered the actual peak-day volumes as set forth in United's flow diagrams filed pursuant to Section 260.8 of our Regulations and the adjusted volumes which were shown on the flow diagrams

presented in United's rate case in Docket No. RP71-41 that were used by the witness sponsoring Exhibit No. 22 from which the 2.39 percent commingling figure is obtained.

41. In addition to the adjusted volumes used in United's rate proceeding in Docket No. RP71-41, it should be noted that if we had referred to the flow diagrams submitted by United in its most recent rate proceeding in Docket No. RP72-75, we would have been provided with data showing that much larger volumes of gas are to be transported on both a peak-day and annual basis into the Green System-East. To be specific, instead of a zero volume entering the Green System-East at point "J" on the peak-day of March 3, 1971, the adjusted figure would be 86,766 Mcf, and instead of 72,990 Mcf entering the Green System-East at point "I" on the peak-day of March 3, 1971, the adjusted figure would be 108,371 Mcf. Similarly, instead of an annual volume of 2,119,631 Mcf entering the Green System-East at point "J", the adjusted figure would be 1,371,196 Mcf, and instead of an annual volume of 3,286,-407 Mcf entering the Green System-East at point "I", the adjusted figure would be 11,024,446 Mcf. Since the adjusted figures used in Docket No. RP72-75 are attempting to estimate volumes for the 1971-72 heating season, they indicate that the Green System-East is expected by United to become increasingly reliant upon deliveries from United's interstate facilities in order to meet the uncertificated market's gas requirements.

42. In determining the jurisdictional issue, however, we do not believe that the relative level of the volumes involved are controlling. Section 1(b) of the Act does not delimit the amount of gas to be transported or sold in

interstate commerce necessary for the exercise of Commission jurisdiction.

43. The case of *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U.S. 515, 535-36 (1945), arising under the Federal Power Act, is instructive in this regard. There the Supreme Court, addressing itself to a *de minimis* argument, stated:

> Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state * * *
>
> Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is over-extending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

44. Our decision herein is in accord with *Federal Power Commission* v. *Florida Power & Light Co.* (U.S. Supreme Court No. 70-38, decided January 12, 1972, ____ U.S. (____ 40 LW 4141) wherein the Supreme Court held that an electric utility was subject to the jurisdiction of this

Commission because energy transmitted by it was commingled with energy transmitted by a jurisdictional company. There the issue was whether any energy was transmitted in interstate commerce *at all*. As the Court stated the test is not how much, but whether; "* * * no matter how small the quantity, FPC jurisdiction will attach because it is settled that Congress has not 'conditioned the jurisdiction of the commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction' " (Slip Op., p. 9, n. 10). The dissent noted that the commingling is minuscule and incidental.

45. The Louisiana Public Service Commission and several other parties contend that the Green System-East should be exempted from Commission jurisdiction under Section 1(c) of the Act.[7] The argument is made that to the extent some volumes of interstate gas have been delivered into the Green System-East such gas has been received, transported, and consumed wholly within the State of Louisiana, and that since the rates, services and facilities of the Green System-East are regulated by the Lou-

[7]Section 1(c) of the Act reads as follows:

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State comission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

isiana Public Service Commission, the requirements for exemption under Section 1(c) have been met. United maintains that Section 1(c) is inapplicable since the Louisiana Public Service Commission may not regulate direct sales,[5] and that granting an exemption under Section 1(c) would leave a regulatory gap.

46. Staff opposes an exemption on additional grounds. It dismisses initially the assertion that Section 1(c) is self-executing and that no application therefor nor showing in support thereof need be made, citing the provision in the Section requiring an evidentiary showing with respect to State commission jurisdiction. Section 1(c) is applicable, argues Staff, only "* * * if all the natural gas so received is ultimately consumed within such State", and that is not the case with all the gas received by United from other persons in Louisiana, *e.g.*, deliveries from the Getty plant at Bastian Bay. It also contends that the "from another person" requirement of the Section is overlooked by those seeking an exemption.

47. The proponents of the Section 1(c) exemption agree that United's Green System-East receives gas from United's system, but seek succor by citing the case of *Mountain Gas Company*, Docket No. CP68-303, and *Cabot Corporation*, Docket No. CP68-176, 42 FPC 305, *aff'd sub nom. Public Service Commission of West Virginia* v *F. P.C.*, 437 F.2d 1234 (4th Cir. 1971) for the proposition that the gas need not be received "from another person"

[5]Art. 6, Sec. 4 of the Louisiana Constitution as amended in 1964, provides in pertinent part that: "* * * the [Public Service] Commission shall have no power or authority to supervise, govern, regulate and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in such sale of natural gas."

as plainly set out in Section 1(c). In our view *Mountain Gas* is inapposite since most of the gas there in question was purchased from another person.[9] Noting that Section 1(c) is applicable solely "to any person engaged in or legally authorized to engage in the transportation of gas in interstate commerce," Staff additionally asserts that the arguments of the parties favoring exemption are inconsistent with their contention that the Green System is an entirely separate intrastate entity. This apparent inconsistency has no bearing on our determination of this question, as we reject the tortured reasoning which would artifically maintain a division of the integrated facilities of United's system. We find that a Section 1(c) exemption does not obtain in the circumstances presented.

48. The Louisiana Commission does not regulate any aspect of direct sales and thus, in any event, an exemption would not be available, even to a separate pipeline company.[10] This Commission, on the other hand, has substantial regulatory authority over the service of gas to direct customers. Deliveries to direct customers cannot be made without a certificate from this Commission and the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of those transactions.[11] In addition, the Commission, pursuant to

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[9]In that case part of the gas was received by Cabot from its own wells at some of the facilities proposed to be exempted. The bulk of the gas, however, was purshased from Tennessee Gas Pipeline Company.

[10]We take official notice of a letter to this Commission, dated June 16, 1971, in which the Chairman of the Louisiana Public Service Commission indicates that the Louisiana Commisson does not exercise jurisdiction over direct sales to industrial customers. We note that 1(c) exemptions have been previously granted within Louisiana. See *Central Louisiana Electric Co., Inc.*, Docket No. CP62-129, 27 FPC 374 (1962); *United Gas Pipe Line Co.*, Docket No. CP68-203, and *Sugar Bowl Gas Corp.*, Docket No. CP68-204, 39 FPC 619 (1968). However, we note that in each case that there was no disclaimer of jurisdiction by the Louisiana Public Service Commission, as in this case.

[11]*Panhandle Eastern Pipe Line Co. v. F. P. C.*, 232 F.2d 467, 471 (5th Cir. 1956).

Section 7(b), must determine whether service to a direct customer or any other customer should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. While the absence of State regulation is not material to a determination of our own jurisdiction; it nevertheless follows that the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State and therefore contribute measurably to the regulatory process.

49. We recognize, however, that the State purports to regulate sales for resale in the New Orleans and Lafayette Districts. While our assertion of jurisdiction herein would substitute Federal regulation for State regulation over such sales, the substitution of Federal regulation occurs simply as a consequence of our determination that these sales are in interstate commerce and the fact that State regulation will be affected has no bearing on our determination. Moreover, the exercise of our jurisdiction over sales and services in interstate commerce does not impinge upon State regulation of sales and services by the distributors receiving gas from United.

50. In declining to grant United and exemption under Section 1(c) of the Act, we are aware that such an exemption was granted in *United Gas Pipe Line Co.*, Docket No. CP66-137, 35 FPC 172. However, that case involved a sale for resale over which the Louisiana Public Service Commission asserted jurisdiction; moreover, the gas was purchased from Transcontinental Gas Pipe Line Corpora-

tion, "another person" within the meaning of Section 1(c), and the facilities involved were not connected with United's interstate system. The present case is clearly distinguishable inasmuch as it involves direct sales, over which the Louisiana Public Service Commission has disclaimed jurisdiction, the gas is not purchased from "another person", and the facilities involved are directly connected to United's interstate system.

51. It is argued that United deliberately introduced interstate gas into the New Orleans District to bring about the situation that exists in order to serve its own interests with respect to its direct-sale contracts and curtailment plans. The alternative that this argument suggests is that the Commission should order United to desist from making any further deliveries into the New Orleans District. With the exception of two producers, no party to this proceeding suggests this course of action. It appears from the record that were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak-day requirements.[12] Moreover, as we have noted herein, the Green System-East will have a considerable deficiency in its peak-day gas requirements for the current winter heating season, as well as for the next heating season. Thus, the jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination.[13]

52. We believe that no extended discussion of the applicable law is required in support of our jurisdiction under the circumstances presented. The Commission's opinion in *Lo-Vaca Gathering Co.*, 26 FPC 606 (1961),

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12See Exhibit 22.

13See *Western Union Telegraph Co. v. Speight*, 254 U.S. 17 (1920); *Price v. Western Union Telegraph Co.*, 156 Fla. 406, 23 So.2d 491 (1945).

aff'd sub nom. California v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), followed by the Supreme Court's *Amerada* and the Fifth Circuit's *Florida Parishes* opinions *supra*, leaves no room for argument that the commingling of interstate gas with intrastate gas and the delivering of gas to intrastate markets from interstate pipelines are sufficient integration of interstate and intrastate operations to bring the uncertificated sales and facilities within the Commission's jurisdiction. As the court pointed out in the *Florida Parishes case* (359 F.2d 525 at 528):

> * * * The facts in each of those cases [*Lo-Vaca* and *Amerada*] more strongly supported the argument for state jurisdiction over the gas produced, gathered, transported and sold in the same state than do the facts of this proceeding. In each instance, however, the Supreme Court held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction "at the outset over the entire transaction".

53. We wish to make clear that the facilities, sales, and services in question became subject to our jurisdiction at such time as the commingling of interstate and intrastate gas took place. The Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural-gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956), *cert denied*, 352 U.S. 971 (1956). *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349 (2nd Cir. 1971), *cert. denied*, ____ U.S. ____ (Sup. Ct. No. 70-216, October 12, 1971).

54. Although there is sufficient evidence in the record

to find jurisdiction, we believe that certain aspects of United's operation of its facilities in the area in question require amplification. In the remanded proceedng United should present an Exhibit K setting forth the lengths and diameters of pipelines and other facilities in the Lafayette and New Orleans Districts for which it seeks certification. The original cost of all facilities should be shown together with accrued depreciation thereon.

55. During the cross-examination it appeared that United has previously obtained certificates to make sales from some of the uncertificated facilities. For example, although United seeks to have its Weeks Island pipeline certificated in this proceeding, the Commission issued on June 26, 1968, an order in *United Gas Pipe Line Co.*, 39 FPC 1029, certificating a sale to Humble Oil & Refining Company from that pipeline. Moreover, despite the fact that the order specifically restricts deliveries of gas to Humble to a maximum of 3,500 Mcf per day, Exhibit 17 indicates that United has delivered up to 7,010 Mcf per day to Humble at that point. Likewise, the Commission has apparently certificated some facilities near the lateral line serving Baton Rouge, but United's witness was not clear as to what those facilities were or whether they are still used for the purpose for which they were originally certificated.

56. United should also include in Exhibit K a separate break-down of the facilities comprising the 24 interconnections at which interstate gas may be injected into the Lafayette and New Orleans facilities. Inasmuch as United claims that increasing quantities of interstate gas will be needed to supply the Southern Louisiana market, it should explain where the increased quantities of interstate gas

will be obtained and which of the 24 interconnections will be used for that purpose.

CERTIFICATION ISSUES

(1) *Introduction*

57. As set forth in its opinion in *Kansas Pipe Line & Gas Co.*, 2 FPC 29 (1939), the Commission has considered five primary factors in determining whether a certificate of public convenience and necessity should be issued. Those five factors are whether a market for the gas has been shown, whether there is a gas supply available to serve the proposed markets for a time sufficiently long to justify the construction of the facilities, whether the facilities proposed to be constructed are adequate from an engineering point of view, whether the proposed sales will return sufficient revenues to enable the applicant to recover the cost of service involved in rendering the proposed sales and services, and whether the applicant will be able to obtain the financing necessary to construct the proposed facilities. United's application in this proceeding is unusual in that the facilities for which it seeks a certificate have already been constructed, the markets have already been attached, the gas is already flowing, the facilities have already been financed, and proposed rate increases covering the sales involved are presently pending before the Commission.

58. Although the Lafayette and New Orleans Districts contain existing pipeline systems now in operation, those systems were constructed many years ago and have been operated as independent intrastate pipeline systems entirely separate from United's integrated interstate system over which the Commission exercises jurisdiction. Therefore, when United filed its application requesting that the

Commission issue a certificate covering all the facilities, resales, and services being rendered in its Lafayette and New Orleans Districts, it was obligated to present evidence showing that the attachment of those facilities, resales, and services to the interstate pipeline system is required by the public convenience and necessity. While we recognize that with existing facilities certain conventional data may be omitted, we note certain deficiencies in the record as outlined below which should be the object of an additional evidentiary presentation.

(2) *Markets*

59. United's market evidence consisted of a tabulation of its resale and direct-sale customers showing the largest volumes which they have taken on non-coincidental peak days, but United failed to show what volumes it is obligated to deliver to its customers under the most recent service agreements and direct-sale contracts. Since United is operating under the curtailment provisions of its tariff at the present time,[14] any certificate issued should contain volumetric limitations in accordance with the Commission's Statement of Policy in order No. 431 issued April 15, 1971, in Docket No. R-418. Therefore, in the remanded proceeding United should present as part of its market evidence copies of the service agreements which it has most recently negotiated with its resale customers. If United's gas supply deficiency prevents it from proposing to deliver contractual volumes to its resale and direct-sale customers, it should make a separate tabulation of the actual volumes it expects to deliver in light of its current gas supply situation.

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[14]United is currently involved in a curtailment proceeding before the Commission in Docket No. RP71-29, *et al.*

(3) *Gas Supply*

60. Since United is now curtailing deliveries to its customers, the Commission assumes that United has a deliverability of less than one year, but United did not present any evidence which would permit the Commission to evaluate the impact on the existing interstate customers that would result if the Commission were to certificate the service proposed to be continued in the Lafayette and New Orleans Districts. Therefore, United's gas supply evidence should show the volumes of gas which will be available to serve the existing interstate markets with and without the markets in the Lafayette and New Orleans Districts. Inasmuch as United claims that a much greater quantity of interstate gas will be needed to serve the Lafayette and New Orleans Districts within the next two or three years, its deliverability exhibit should project the impact on the existing interstate market if it were to be permitted to provide service from its interstate system to all of its customers in the Lafayette and New Orleans Districts.

61. United's shortage of gas raises the possibility that authorization of markets in the Lafayette and New Orleans Districts will result in the taking of disproportionate volumes of gas from existing industrial customers now being served with the gas supply previously committed to serving only interstate markets. Therefore, United's deliverability study should show to what extent the deficiencies in gas supply alleged for the Lafayette and New Orleans Districts are based upon the requirements of industrial customers as compared with the needs of residential and commercial customers.

62. A question in this proceeding is whether customers who were being served from what has previously been an

entirely separate intrastate system with its own gas reserves should now be allowed to continue to purchase gas from a gas supply which presumably was not committed to serving an uncertificated system and its customers.

(4) *Engineering Feasibility*

63. United's evidence consisted of flow diagrams showing net movement of gas on only an annual basis. The Commission has compensated for United's failure to present peak-day flow diagrams by examining the diagrams for January 6, 1970, which were received in evidence as Item E and by taking official notice of the flow diagrams for the peak day of March 3, 1971. At the remanded hearing the peak-day flow diagrams for March 3, 1971, should also be received in evidence as an item by reference to the Commission's files.

64. The Commission normally evaluates engineering and economic feasibility on the basis of the third-year volumes of gas to be served in a proposed market. Since United has previously served the Lafayette and New Orleans Districts with gas from fields located fairly close to the markets, it is essential that United show how increasing quantities of gas can be introduced into the Lafayette and New Orleans facilities so that the Commission will know whether additional facilities will have to be constructed to transport gas from interstate gas sources to market in the Lafayette and New Orleans Districts.

(5) *Economic Feasibility*

65. To the extent that United addressed itself to the question of economic feasibility, it shows that the certificate should be denied because it claims that the direct-sale

customers which are presently attached to the Lafayette and New Orleans facilities are noncompensatory since the rates in some of their contracts with United are so low that they do not cover United's average cost of purchased gas.

66. The Commission has for many years conditioned certificates to require pipeline companies and industrial customers to modify their contracts to remove "escape" clauses therefrom.[15] There have been instances where the Commission conditioned a certificate authorizing the expansion of a pipeline company's existing system upon the procurement of firm contracts with industrial customers to assure the economic feasibility of the proposed expansion.[16] In the remanded proceeding, if it is determined that the service United is rendering to industrial customers is non-compensatory, and if the certificate were otherwise required by the public convenience and necessity, the Commission could consider granting the certificate conditioned to assure that the allocable cost of service to the direct industrial customers is recovered.

67. Before the Commission can determine economic feasibility, however, United should present an economic feas-

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[15] In Houston Texas Gas & Oil Corp., 16 FPC 118 (1956), *aff'd sub nom. Florida Economic Advisory Council v. F. P. C.*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958), the Commission conditioned the certificate issued to require removal of clauses in contracts which would have permitted electric companies to pay transportation rates based on the competitive cost of oil. In *Northern Natural Gas Co.*, 22 FPC 164 (1959), *aff'd sub nom. Minneapolis Gas Co. v. F. P. C.*, 278 F.2d 870 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960), the Commission required a pipeline company to remove from its direct-sale contracts with electric companies clauses which would have permitted the electric companies to stop purchasing gas if the price of coal should become cheaper than the cost of gas.

[16] *Midwestern Gas Transmission Co.*, 22 FPC 775 (1959, *aff'd sub nom. Michigan Gas and Electric Co. v. F. P. C.*, 290 F.2d 374 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 897 (1961), *Northern Natural Gas Co.*, 30 FPC 859 (1963), and *Southern Natural Gas Co.*, 31 FPC 789 (1964).

ibility study showing the cost of service allocable for the Lafayette and New Orleans Districts. Such a study should show the deficit, if any, which would result from serving both resale and direct-sale customers in the Lafayette and New Orleans Districts.

68. Gulf States Utilities Company presented Exhibit 24 which indicates that United's full cost of service in the entire New Orleans Division (which includes both the Lafayette and New Orleans Districts as well as United's *interstate* transmission lines) ranges from 3.4 to 4.5 cents per Mcf exclusive of the cost of purchased gas. However, Gulf States' exhibit needs to be refined so as to allocate only to the Lafayette and New Orleans Districts that portion of the cost of the interstate pipelines which should appropriately be assigned to those areas. Despite the unrefined nature of its evidence, Gulf States shows that the rate in its direct-sale contract with United fails to pay United's full cost of service associated with serving Gulf States' generating plants. The Commission must determine whether to certificate direct sales which do not pay their full share of the cost of service.

69. In presenting its economic feasibility evidence in the remanded proceeding, United may utilize the same rates of return and depreciation which were employed in its last rate increase filings in Docket No. RP72-75. Use of such rates in a certificate case is illustrative of the highest costs the existing and proposed customers may have to pay and makes its possible to test the economic feasibility of proposed new service in light of rates being proposed for service to existing customers.

70. The foregoing discussion shows that the evidence

in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity. We shall, therefore, remand the proceedings to the Presiding Examiner as hereinafter provided. Our determination that the Commission has jurisdiction over United's operations in the Victoria and New Orleans Divisions, however, requires that we address ourselves to the status of United's existing services in these Divisions pending the Commission's determination of the certificate issues.

71. In the absence of the issuance of a certificate at this time, we have two alternatives with regard to the existing service provided by United pending a Commission determination on remand: (1) the immediate termination by United of deliveries into the systems in question, or (2) the continuation of deliveries of interstate gas into these systems on an emergency basis pending final disposition of this matter.

72. Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970-71 heating season and, based on projections for the 1971-72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District. Moreover, the record does not disclose the impact on United's customers in the Victoria and New Orleans Divisions of an abrupt discontinuation of interstate deliveries into these systems.

73. In view of these facts, we believe that the public interest may best be served by continuation of United's

service to prevent the undue hardship that might result from an immediate termination of interstate deliveries. We shall, therefore, authorize the continuation of such existing deliveries of interstate gas into the Victoria and New Orleans Divisions on an emergency basis, subject to the condition that these facilities be operated as part of United's integrated interstate system fully subject to our exclusive jurisdiction. Thus due to the current shortage of gas on United's system, deliveries to customers in these Divisions shall be subject to the curtailment provisions of United's tariff, pending the Commission's decision in the remanded proceedings, and all other matters, rate or otherwise, shall be subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder.

74. We are aware that the finding of jurisdiction over the New Orleans and Lafayette Districts raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems. We do not consider this question herein. To assure equitable treatment we will permit those producers selling directly to facilities herein declared jurisdictional to file their contracts pursuant to Paragraph 12 of Docket No. R-389A for consideration by this Commission without prejudice to their right to challenge this opinion on appeal and without admitting that this Commission has jurisdiction over the sales in question.

75. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, ____ F.2d ____, the court held that "* * * The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction" (Slip Op., p. 29). Since we respectfully disagree with the legal

conclusion drawn by the court, we are constrained to consider the question of whether this Commission is precluded from making an independent decision based upon the record in the case before us.

76. We have examined the basic authorities on *res judicata* and estoppel by judgment and fail to find any authority for the proposition that an administrative agency charged by Congress to determine its jurisdiction in accordance with the Administrative Procedure Act and the Natural Gas Act must terminate its proceedings when a court, in a collateral suit, reaches the jurisdictional question. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

77. We have considered such cases as *Commissioner* v. *Sunnen*, 233 U.S. 598 (1948), wherein the Supreme Court held the doctrine of estoppel inapplicable to subsequent relitigation by an agency of the same question decided adversely to it in court.

78. In *Otis & Co.* v. *S. E. C.*, 176 F.2d 34 (D.C. Cir. 1948), *rev'd per curiam*, 338 U.S. 843 (1949), SEC brought a suit in the District Court to require certain parties to testify in a concurrent administrative proceeding. Upon the court ruling against SEC, Otis then sought injunctive relief to terminate the administrative hearings. The District Court dismissed the suit and the Court of Appeals reversed. The Supreme Court upheld the District Court dismissal, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), *supra*.

79. In *Federal Water and Gas Corp.*, 188 F.2d 100 (3rd Cir. (1951), the SEC approved a plan which was ultimate-

ly affirmed in the Supreme Court. On subsequent order, the Court of Appeals attempted to modify the agency's order, but the Supreme Court prohibited this. This decision is not in point.

80. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), has no application to this situation since there was no question of forum or primary jurisdiction. The same is true of *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938).

81. In *U. S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), the Advisory Board of Contract Appeals held hearings in which the company asserted claims against the Atomic Energy Commission for additional compensation and time extension. Subsequent to the decision, the respondent brought suit for breach of contract in the Court of Claims which ruled that the factual issues in the controversy should be resolved in a judicial trial. The Supreme Court held that the Court of Claims could review the administrative record, but could not retry the issues, which had properly been before the agency and which the parties had an adequate opportunity to litigate. This case is instructive, since it reflects the deference to administrative proceedings which we have asserted.

82. In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Federal Power Commission issued a license to construct and operate a hydroelectric project. The City petitioned the Court of Appeals on the ground that the City could not act in opposition to a State policy. The Court of Appeals affirmed the Commission's order and the Supreme Court denied certiorari. In regard to the bond issue, the State court enjoined the City and Supreme Court

of Washington affirmed. The U.S. Supreme Court in granting certiorari stated that the bond validation suit was an impermissible collateral attack upon the final judgment of the Court of Appeals in the initial proceeding. There, again, the administrative proceedings were held to be primary.

83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The *LP&L* case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commission to decide the case; — the Commission did not — and could not — take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered.

The Commission finds:

(1) Applicant, United Gas Pipe Line Company, a Delaware corporation having its principal place of business in Shreveport, Louisiana, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of January 20, 1942, in Docket No. G-216, 3 FPC 3.

(2) United has introduced significant quantities of in-

terstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965.

(3) The Federal Power Commission has jurisdiction under the Natural Gas Act and particularly Sections 2(7) and 1(b) thereof over the facilities, transportation, and sales for resale of natural gas by United by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

(4) United has failed to present sufficient evidence as required by the Commission's Regulations to permit the Commission to evaluate the factors entering into determining whether the certificate of public convenience and necessity requested by United should be issued or granted with conditions.

(5) The proceeding should be remanded to the Presiding Examiner in order to permit United to satisfy the evidentiary deficiencies which have hereinbefore been specified.

(6) United's sales and services within the Victoria and New Orleans Divisions should be continued on an emergency basis pending further order of the Commission in the remanded proceedings.

The Commission orders:

(A) The proceeding in Docket No. CP71-89 is hereby remanded to the Presiding Examiner for receipt of additional evidence to overcome the deficiencies hereinbefore specified.

(B) Within 45 days after issuance of this order United shall file with the Commission and serve upon the Presiding Examiner, all parties to the proceeding, and the Commission's staff the testimony and exhibits required to satisfy the evidentiary deficiencies hereinbefore specified.

(C) Within 30 days after the filing and service of United's evidence all other parties and the Commission's staff shall file with the Commission and serve upon the Presiding Examiner, United, and other participants any evidence which they may wish to present in support of their positions.

(D) Service to all customers in the Victoria and New Orleans Divisions shall be continued on an emergency basis, on condition that United's facilities therein be operated as part of its integrated interstate system, subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in this proceeding.

(E) The hearing in the remanded proceeding shall commence on April 25, 1972, at 10:00 a.m. (EST) in one of the Commission's hearing rooms, 441 G Street, N. W., Washington, D. C. 20426.

(F) The motions for oral argument made herein are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

Kenneth F. Plumb,
Secretary.

CARVER, Commissioner, *dissenting:*

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipe-

line capacity needed markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ____ FPC ____ (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

The preceding observations are merely descriptive of

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[1]Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2]The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: " . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia v. Carroll, et al.* (1950) 338 U.S. 586, 600-602.

the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light* v. *United Gas Pipe Line Company*, cited par. 75, majority opinion *supra*, constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata*, estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present: The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commissioner* v. *Sunnen*, 333 U.S. 598 (1948). (This case is not the same as *FPC* v. *Amerada*

Petroleum Corp., et al., 379 U.S. 687 (1965), because it was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurdisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment," *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA3, 1951), cert. den. *sub. nom. Chenery Corp. et al.* v. *SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits,

[3]In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

Stoll v. *Gottlieb*, 305 U.S. 165, 172 (1938), and enforces repose "not only respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final, *U.S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private law suit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

JOHN A. CARVER, JR.
Commissioner

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
John N. Nassikas, Chairman;
John A. Carver, Jr., Albert B. Brooke, Jr.,
Pinkney Walker, and Rush Moody, Jr.

United Gas Pipe Line Company

Docket No. CP71-89

OPINION NO. 610-A

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

(Issued April 7, 1972)

NASSIKAS, Chairman:

1. A number of parties[1] have filed applications for rehearing of the Commission's Opinion No. 610 and order, issued February 9, 1972, wherein we found that this Commission has jurisdiction under the Natural Gas Act over the facilities, transportation and sales for resale of natural gas by United Gas Pipe Line Company (United) by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

[1]New Orleans Public Service Inc. and the City of New Orleans (jointly), Texas Gulf Sulphur Company, Boise Southern Company, Texas Gas Transmission Corporation, Louisiana Gas Service Company, Louisiana Power and Light Company, Gulf States Utilities Company, Cities Service Oil Company, Shell Oil Company, Humble Oil & Refining Company, Texaco Inc., and State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission (jointly).

2. Additionally, the State of Louisiana and the Louisiana Public Service Commission request an investigation of alleged violations of "the Natural Gas Act and of Gas Reserves" and move to stay Opinion No. 610 and the remanded proceedings.

3. The applications for rehearing challenge the Commission's assertion of jurisdiction on various grounds, all of which have been considered and treated by the Commission in Opinion No. 610. We do not believe that further discussion is necessary. There have been certain allegations of erroneous factual conclusions, however, to which further comment would be appropriate.

4. Several parties, whose arguments are directed to the Green System-East, contend the Commission erroneously concluded that gas from the Green System-East leaves the State of Louisiana. They argue that there is nothing in the record to show that gas actually flows out of the state and that annual flow diagrams filed as part of FPC Form 2 actually show flows at point "U" going to Baton Rouge. At paragraphs 37 and 38 of the Opinion, we stated that gas from the Green System-East enters the Green System-West, flows into the interstate pipeline of the Mid-Louisiana Gas Company at point "U" and thereafter appears to flow out of the state. In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows.

5. Texaco Inc. asserts that there is an error in paragraph 25 of the Opinion wherein the Commission described

gas flows from the De Large Field. It contends that the Commission erred in concluding that gas entered the Green System-East from the De Large Field. The Commission does not so state in paragraph 25, nor is such a conclusion intended. Despite the fact that the De Large Field gas does not enter the Green System-East, interstate gas including deliveries from the De Large Field is used to serve the Dulac area. Texaco Inc. also notes that the Commission's opinion omits the fact that several small isolated sections of transmission facilities in the Green System-East do not receive commingled flows. This has no bearing on the Commission's general assertion of jurisdiction over the New Orleans Division and is a matter which will be considered at the time that particular facilities are before us for certification.

6. Boise Southern Company (Boise) alleges that Opinion No. 610 contains a substantial misstatement of fact relating to those facilities by means of which it receives its gas deliveries. It notes that, contrary to the Commission's statement in paragraph 12 of the Opinion, the interconnection at point "A" has been certificated by the Commission[2] as was a 12-inch line which interconnected with Texas Eastern's 30-inch line. The only other transmission line used to serve Boise is 6.1 miles of 8-inch line. Boise argues that any assertion of jurisdiction over the 8-inch line should have been made at the time of certification in Docket No. CP67-26, and that in the absence thereof it had the right to understand that no further authorization from the Commission would be required. A review of the Commission's order in Docket No. CP67-26 indicates that certain facilities at point "A" were certificated by the Commission. This

[2]Commission order issued on July 22, 1969, in Docket No. CP67-26 (42 FPC 157).

factual clarification, however, does not give substance to Boise's argument. The fact that additional facilities utilized to serve Boise were not certificated previously does not exempt United's facilities serving Boise from our assertion of jurisdiction.

7. Texas Gas Transmission Corporation's application for rehearing is directed solely to the Commission's order that deliveries by United be continued on an emergency basis pending the conclusion of the remanded proceedings. It urges the Commission to impose interim volumetric limitations on United's customers affected by this case at the levels which correspond to the maximum takes of such customers in the past as reflected in the record. The issue of volumetric limitations upon certification is one that is to be taken up in the remanded proceedings as we believe the record evidence thereon is presently insufficient. In the interim we have provided that such deliveries shall be subject to curtailment in the same manner as United's other customers.

8. Texas Gulf Sulphur Company, which was granted late intervention by Commission order, issued March 31, 1972, asserts that the Commission was in error in not ordering United to cease further violations of the Natural Gas Act. It further contends that the Commission erred in ordering United to amend in any way its direct sales contracts or to make its direct sales subject to United's FPC Gas Tariff without the consent of its direct customers to the application of such tariff provisions or to any changes therein. Contrary to Texas Gulf Sulphur's assertion the Commission has not ordered United to amend its direct sale contracts. In authorizing United to continue its deliveries on an emergency basis we have, however,

imposed certain conditions which we believe are in the public interest.

9. The State of Louisiana and the Louisiana Public Service Commission request an investigation of violations of the Natural Gas Act and of gas reserves alleging that there has been a "deliberate, extensive and wilfull violation by United of the prohibition of Section 7(e) of the Natural Gas Act against any proposed construction of extension of facilities which shall constitute the transportation or sale of natural gas subject to the jurisdiction of the FPC without first obtaining a certificate of public convenience and necessity authorizing such acts or operations." This allegation appears to us to be inconsistent with the position taken by these parties that the Commission does not have jurisdiction over the facilities in question. Nevertheless, in finding the New Orleans Division jurisdictional on the basis of unauthorized gas flows, we stated that the Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. We refrained, however, from issuing a certificate of public convenience and necessity for any of the facilities, sales or services as we found that the record requires amplification. Among the matters to be addressed in the remanded proceedings would be the justification for United's initiation of flows into the New Orleans Division, as well as the requirements of the New Orleans Division for United's interstate flows. The latter would, of course, require a review of gas reserves within the New Orleans Division. Thus, we believe that the remanded proceedings will permit a resolution of these issues. Accordingly, we shall deny the State of Louisiana and the Public Service Commission's petition.

10. The State of Louisiana and the Louisiana Public Service Commission while expressing opposition to the reopening of the record, alternatively request that the record be broadened to include certain information specified in Appendix A of Special Order No. 7/71 of the Louisiana Public Service Commission, issued February 28, 1971. In the remanded proceedings the parties will have an opportunity to present evidence bearing on all issues related to certification. Requests for data may be directed to the Presiding Examiner. As for the motion for stay we do not believe that it would serve the public interest to stay our order and delay the remanded proceedings.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 610 and accompanying Order except as that Opinion is clarified above.

The Commission orders:

(A) The applications for rehearing of the Commission's Opinion No. 610 and order, described herein are denied.

(B) The petition for an investigation of violations of the Natural Gas Act and gas reserves and the motion for stay filed by the State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended.

(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED GAS PIPE LINE COMPANY

Docket No. CP71-89

(Issued April 7, 1972)

CARVER, Commissioner, *dissenting*:

My dissent to Opinion No. 610 was broadly stated as embracing a wide array of legal, policy, and procedural differences with the conclusions of the majority, but refrained from any extensive analysis of those issues because the *res judicata* question seemed so clearly dispositive of the proceeding at that time. I remain of that opinion, but feel compelled to comment briefly on two of the substantive matters raised by certain of the parties in their applications for rehearing and not satisfactorily resolved in this order.

A critical element of the jurisdictional finding is the conclusion that gas flows into *and out of* United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the

document or other factual source is clear on its face. That is not the case here; the conclusions drawn by the majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U. S. Code)[1] and its judicial antecedents.

Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-

[1] ". . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence. . . "

Louisiana (point "U") "*appears*" to flow out of the state. This is indeed a flimsy predicate for an action having the drastic consequences referred to in my original dissent. Nor is it clear how gas entering Mid-Louisiana facilities at or near the Baton Rouge city gate can leave the State. As Texaco's application for rehearing states, Mid-Louisiana's line from the Monroe Field extends in a southerly direction and terminates at Baton Rouge. Its function is to carry gas across a corner of Mississippi back into Louisiana. Gas entering that line at point "U" goes only into Baton Rouge and is consumed there.

Until this proceeding at least, the *Florida Parishes* case represented a high water mark in the use of the commingling theory as a jurisdictional rationale. In its very first paragraph, Opinion No. 610 lays the foundation for the conclusion that that case is controlling here. This ignores a whole host of differences in the two situations, only one of which needs mention for present purposes. The question in *Florida Parishes* was whether intrastate sale of incidental amounts of gas taken from a transmission line which was an integral part of an interstate operation required our certification. Here, the facts are diametrically opposite: at most 3 or 4 percent of the volumes carried by an otherwise separate and distinct intrastate facility may have their origin in sources dedicated to the interstate market. To claim that a situation which was concerned with a 100 percent interstate supply source is identical or even comparable with one that is more than 96 percent intrastate is to reduce all problems and issues to the same dimensions. The public interest demands a better sense of perspective on the part of this Commission.

JOHN A. CARVER, JR.
Commissioner

APPENDIX C — MISCELLANEOUS

Motions

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, ET AL
Petitioners

VERSUS

FEDERAL POWER COMMISSION
Respondent

PETITION OF
LOUISIANA POWER & LIGHT COMPANY
FOR REHEARING IN BANC
IN NO. 72-1714

Petitioner, Louisiana Power & Light Company, respectfully petitions this Honorable Court for a rehearing *in banc* of its petition to review and set aside opinions and orders of the Federal Power Commission in the above titled cause, and in support of this petition for rehearing *in banc* represents to the Court as follows:

We reserve our argued position as to each of the points raised in our petition for review, but in this petition for rehearing *in banc* address ourselves solely to that feature

of the decision wherein we believe the Court may be convinced its result is based upon application of incorrect legal principles.

Thus, this petition is devoted to convincing this Court that it has erred in failing to apply the Substantial Evidence Test to the Federal Power Commission's determination that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. By this failure the Court has failed to preserve uniformity in its decisions with respect to a question of exceptional importance. Therefore, we respectfully suggest that this is a matter where a rehearing *in banc* is appropriate.

In *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 456 F. 2d 326 (5th Cir. 1972), this Court held that the channel of constant flow was intrastate in nature, and that any interstate gas which had been introduced into Green System-East was so minimal in amount that federal jurisdiction had not attached. Although the Supreme Court of the United States did reverse this Court on the question of whether it was necessary to await the Commission's own determination of jurisdiction, *the Supreme Court did not reverse those substantive holdings of this Court.* Rather, the Supreme Court simply ruled that this Court should defer to the FPC for the initial determination of jurisdiction subject to "review of the FPC decision . . . in due course pursuant to §19(b) of the Act, 15 U.S.C. §717(b)." *Federal Power Commission v. Louisiana Power & Light Co.*, ... U.S. ....., 92 S. Ct. 1827, 1842 (June, 1972).

Section 19(b) of the Natural Gas Act expressly provides

for the applicability of the Substantial Evidence Test to such proceedings. Identical language in the Federal Power Act was interpreted by the Supreme Court in 1972 as importing the Substantial Evidence Test into review of Federal Power Commission proceedings. *Federal Power Commission v. Florida Power & Light*, 404 U.S. 453, 92 S. Ct. 637 (January, 1972).

On the basis of the same evidence before this Court last year, the evidence upon which the Court then concluded that Green System-East was intrastate, the Court has now ruled that as a matter of law the Green System-East is interstate. This is not the logical consequence of the Supreme Court's ruling. It is a logical consequence of a misapplication of fundamental principles of administrative law.

The Court has this time sustained a finding that the system is interstate on the ground that there is a rational basis to support the Federal Power Commission's finding:

> "Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, *Administrative Law Treatise* §30.05." Slip opinion p. 19.

Davis, the only authority cited by the Court, in the place cited by the Court, discusses this "Rational Basis Test" as a device sometimes used by Courts to avoid a determination of what is a question of fact and what is a question of law. If the Court can avoid making such a distinction, it might be argued that it need not determine whether there is substantial evidence to support the agency's action.

This approach to the Rational Basis Test is not sanctioned by the United States Supreme Court. Under decisions of the Supreme Court, there must be both substantial evidence *and* a rational basis to sustain an agency's action: "Judicial review of this conclusion is limited to consideration of whether it has a rational basis *and is supported by substantial evidence.*" *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 126 (1962), emphasis added.

Avoiding a determination of whether there is substantial evidence to support the agency's determination denies to LP&L the very review which the Supreme Court reserved to it under §19(b) of the Natural Gas Act, 15 U.S.C. §717(b). It also violates the mandate of the Administrative Procedure Act that "the reviewing Court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . ." and that the Court "in making such a determination shall review the whole record. . . ." 5 U.S.C. §706.

The approach taken by this Court this time is directly contrary to the leading case of *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1950). There the Court discussed at length the dissatisfaction with the finality accorded by some Courts to agency decisions "when the reviewing Court could find in the record evidence which, when viewed in isolation, substantiated. . ." the agency's findings. 340 U.S. 478. The case epitomizing the abuse which Congress sought to correct was *N.L.R.B. v. Nevada Consol. Copper Corp.*, 316 U.S. 105 (1942), where the Court sustained an agency's action on the ground that "upon an examination of the record we cannot say that the findings

of fact of the Board are without support in the evidence." 316 U.S. at 107, quoted in discussion by the Supreme Court of the background of the APA in *Universal Camera*, 340 U.S. at 486. Sustaining an action on the ground that it is "not without support in the evidence" is the same as sustaining it on the ground that it is not without a "reasonable basis." Therefore, the approach taken by this Court this time is identical to the approach which the Supreme Court ruled impermissible under *Universal Camera*.

In *Universal Camera* the Court ruled that provisions by Congress for the review of administrative determinations must be read in conjunction with the provision of the Administrative Procedure Act requiring that the Court strike down such agency action if not supported by substantial evidence on the record as a whole:

> "Whether or not it was ever permissible for Courts to determine the substantiality of evidence supporting a . . . decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." 340 U.S. at 487-488.

A finding that there is a reasonable basis for the FPC's position does not meet the test of *Universal Camera*. To say that there is a reasonable basis without finding that there is substantial evidence is merely to say that there is *some* evidence from which an inference may be drawn in support of the agency's finding. If that is all the evidence there is, then this Court's duty under the Administrative

Procedure Act is to strike down the FPC's determination, not to avoid the issue under a claim of limited review. "Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." *Universal Camera*, 340 U.S. at 490.

The choice before the Court this time was not between deciding the matter as though it were before the Court *de novo* or sustaining the FPC's action if some reasonable basis could be found. The choice was to sustain or strike down the action according to *whether there was substantial evidence.* The failure of the Court to discuss any substantial evidence which warranted a different conclusion from that which this very Court had reached in 1972 demonstrates that the Court "cannot conscientiously find that the evidence supporting that decision is substantial." *Universal Camera*, 340 U.S. at 488. Indeed, the statement by the Court that because of its "prior holding" it is "almost certain" that the Court would not reach the same conclusion as the FPC if the determination were less limited than the "reasonable basis" test, is an admission by the Court that no new substantial evidence has been developed sufficient to sustain a finding that the system is interstate.

Accordingly, we urge that a rehearing *in banc* be ordered so that this Court may exercise the responsibility placed in its keeping by Congress to review the actions of administrative agencies, and by so doing restore to its decisions uniformity on this question of exceptional importance.

Respectfully submitted,

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ATTORNEYS FOR LOUISIANA
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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, ET AL
Petitioners

versus

FEDERAL POWER COMMISSION
Respondent

PETITION OF
LOUISIANA GAS SERVICE COMPANY
FOR REHEARING IN BANC
IN NO. 72-1715

Petitioner, Louisiana Gas Service Company (LGS), respectfully petitions this Honorable Court for a rehearing *in banc* of its petition to review and set aside opinions and orders of the Federal Power Commission. In support of this petition LGS makes the following representations:

LGS reserves its argued position as to each of the points raised in its petition for review, but in this petition addresses itself solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon application of incorrect principles of law.

The thrust of this petition is that the Court has erred in ruling that Congress has not excluded the Green System-East from the jurisdiction of the Federal Power Commission by the enactment of the Hinshaw Amendment to the Natural Gas Act. By so ruling the Court has failed to maintain a uniformity in its decisions in a proceeding involving a question of exceptional importance. Hence, we respectfully suggest that this is a matter where a rehearing *in banc* is appropriate.

In *Louisiana Power & Light Company v. United Gas Pipe Line Co.*, 456 F.2d 326 (5th Cir. 1972), after pointing out that the Green System-East is physically located in and functions entirely in Louisiana, a panel of this Court ruled that its regulation is "substantially and essentially a localized matter committed to Louisiana jurisdiction". 456 F.2d at 339-340. Section 1(c) of the Natural Gas Act (the Hinshaw Amendment) exempts by operation of law from the jurisdiction of the Commission anyone who meets the following requirements:

1. Any person engaged in transportation or resale of natural gas in interstate commerce,

2. Where such gas is received by such person from "another person" within or at the boundary of a State,

3. If all the natural gas so received is consumed within the State, and

4. The activities of such a person are subject to regulation by the State.

It is clear from this Court's 1972 decision that the Green System-East is within the purpose of the Hinshaw

Amendment as a matter of essentially local concern. The essential question before the Court is whether the literal language of the Hinshaw Amendment *compels* a departure from this Court's earlier decision.

We submit that the construction given by this Court to the Hinshaw Amendment is inconsistent with its treatment of the entire Green System as a single unit for the purpose of determining the existence of federal jurisdiction. The crucial part of the Court's reasoning that demonstrates the inconsistency is as follows:

> 'Thus, under §1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who received gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which operated by the same "person." ' Slip Opinion, pp. 23-24.

The fatal flaw in the Court's reasoning lies in its gloss upon the statute to limit the Hinshaw Amendment to *receipt from another person engaged in transmission at the point of interconnection with the exempt facility.* One searches the statute in vain to find any requirement that the exempt facility connect *directly* with another person. So long as the operator of the facility claimed as exempt does in fact receive the gas transported in that facility from another person within the state and the gas is

"*ultimately*" consumed within that state, the Hinshaw exemption is operable.

This time the Court has erred in making a faulty extrapolation from the legislative history of the Hinshaw Amendment. The fact that as a matter of history the occasion which gave rise to the passage of the Hinshaw exemption was one involving the acquisition of gas by a local distributor from one engaged in interstate transmission does not of itself create any limitation in the statute to such circumstances. The test of the limitation of the scope of a statute is that meaning consistent with both its language and its purpose. The language of the Amendment is not limited to instances where acquisition is from those engaged in transmission. It applies where the gas is acquired "from another person within or at the boundary of a State" whenever such gas is "ultimately consumed within such State." The declared purpose of the Amendment is to exempt from FPC regulation those matters primarily of local concern. If a facility which receives its gas from another person engaged in interstate transmission is primarily of local concern, then the same is true a *fortiori* of one who acquires from another person engaged in the production of such gas.

In this case there is no disputing the fact that United is not a producer and purchases all of its gas from *other persons*. The record is perfectly clear that United does not furnish itself any gas or bring any gas into the Green System-East from outside Louisiana, and all of the gas is furnished to United by "other persons", i.e., Texaco, Shell, Gulf, *et al.* The fact that United itself operates the facility by which the gas is transmitted from the other persons who are the producers to the facility which transmits the gas for ultimate consumption within the State does not

alter the status of the facility which transports the gas to interstate consumers under the Amendment.

The construction given by this Court is not necessary to avoid the danger of extending the statutory exemption to local branches of a single interstate system formed by the expedient of an interstate transmitter's placing its statewide delivery systems under the control of a wholly-owned subsidiary. Such bad-faith efforts are defeated by a reasonable construction of "another person" to exclude entities formed for that purpose. The gloss added by the Court to the Amendment to require that there be another person *at the point of delivery* adds nothing to the protection afforded by the language of the Act itself.

Thus, in this case where the operator of a facility used to transport gas for ultimate consumption within a State does acquire the gas from other persons who produce it, the Hinshaw exemption is applicable. The test under the statute is ultimate consumption, not the intermediate mode of transportation. That regulation of the facility in question is a matter primarily of local concern has already been determined by the Court. This is a matter of exceptional importance, and the Court should accordingly grant a rehearing *in banc*.

Respectfully submitted,
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Flow Diagram

EXHIBIT 29

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SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-868

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioner

versus

FEDERAL POWER COMMISSION

PETITION OF LOUISIANA GAS SERVICE COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

LOUISIANA POWER & LIGHT COMPANY, ET AL,
Petitioner

versus

FEDERAL POWER COMMISSION

PETITION OF LOUISIANA GAS SERVICE COMPANY FOR A WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Louisiana Gas Service Company (LGS) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in No. 72-1714, *Louisiana Power & Light Company et al v. Federal Power Commission.* (LGS being petitioner in 72-1715)

OPINION BELOW

The opinion of the Court of Appeals (App. B., *infra*, at A-7) is not yet reported. The opinions and orders of the Commission (App. B, *infra*, at A-34 and A-77) are reported at 47 F.P.C. 245 and 1021.

JURISDICTION

The opinion of which petitioner seeks review issued on June 28, 1973. Petitioners for Rehearing and for Rehearing En Banc were denied September 5, 1973. Stay of Mandate was issued October 10, 1973 to afford opportunity for review by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that a pipeline facility owned by a company engaged in the transportation of natural gas in interstate commerce but used by that company solely to transport natural gas purchased from persons within the boundaries of a state to ultimate consumers also in that same state is not entitled to a Hinshaw exemption under §1(c) of the Act.

STATUTES INVOLVED

Section 1(c) of the Natural Gas Act, 15 U.S.C. §717, set forth in Appendix A, *infra*, pp. A-1 *et seq.*

STATEMENT OF THE CASE

This case involves the jurisdictional status of a pipeline facility, known as the Green System-East, of United Gas Pipe Line Company (United) located wholly within the State of Louisiana, in the southeastern portion of the State, generally in the area south of New Orleans to an area just east of Baton Rouge. For over thirty years the Green System-East has been serving only intrastate customers, and has therefore been subject to the jurisdiction of the Louisiana Public Service Commission and not the Federal Power Commission (FPC). Petitioner is a natural gas distribution company, subject to the jurisdiction of the

Louisiana Public Service Commission, purchasing gas for resale from United, wholly consumed within the boundaries of Louisiana.

Without the consent or knowledge of the FPC, the Louisiana Commission, or its customers, United has introduced what it claims to be interstate gas into the system. Petitioner has taken the position below (and adheres to that position here) that the Green System-East is an intrastate facility based upon the "channel of constant flow" test established by this Court in *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 67 S.Ct. 1482 (1947); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486 (1965). However, that position being presented by other applicants, in this petition LGS will seek to demonstrate that even if *arguendo* Green System-East were considered interstate, the facility would nonetheless be exempt from Commission jurisdiction under § 1(c) of the Natural Gas Act.

THE COMMISSION DECISIONS BELOW

In Opinion 610 issued February 9, 1972, Appendix B at A-34 herein, confirmed by Opinion 610-A issued April 7, 1972, Appendix B at A-77 herein, the FPC held that the Green System-East has become interstate and that the Green System-East was not exempt under the Hinshaw Amendment because the direct sales of United are not subject to regulation by the Louisiana Public Service Commission and there is no purchase from "another person" at the specific points where the supposed interstate gas is introduced into the Green System-East.

THE COURT DECISION BELOW

The Court of Appeals for the Fifth Circuit sustained the Commission's finding on the Hinshaw point on the ground that United did not take from "another person" at the points where the supposed interstate gas was introduced into the Green System-East. It expressly declined to pass on the ground of alleged lack of jurisdiction by the Louisiana Commission, which had been contested on the ground that the Louisiana Commission had jurisdiction of all aspects of the facility excepting only direct industrial sales therefrom.

REASONS FOR GRANTING THE WRITS

The issue presented by this case is of fundamental importance to the administration of the Natural Gas Act and to the utilization of the natural gas resources with which that Act is concerned. The decision below, which conflicts in principle with prior decisions of the Commission and with the declared intention of Congress, would grant to the FPC jurisdiction over wholly intrastate facilities and would turn over to the FPC jurisdiction properly belonging to the Louisiana Commission to regulate and allocate the uses of gas being produced, transported and consumed wholly in Louisiana. Thus, the question of the utilization of that portion of the natural gas produced in Louisiana and dedicated to Louisiana consumption—completely divorced and apart from the substantial majority of amounts of gas taken out of Louisiana for consumption elsewhere as allocated by the FPC—would be placed in the hands of a federal regulatory body less responsive to the needs of the State of Louisiana than is the Louisiana Commission. Additionally, if certain inaccurate characterizations of facts by the FPC are accepted as true in the absence of substantial evidence,

as the Court of Appeals did, then still another question of overriding importance to the administration of the Natural Gas Act arises: the question of first impression as to whether § 1(c) of the Natural Gas Act is applicable to facilities used to transport natural gas received into those facilities from another person within the same state in which the gas is then wholly transported and ultimately consumed, the facilities being subject to regulation by a state commission. This question of interpretation of the Hinshaw Amendment is of national importance, there being literally hundreds of Hinshaw exemptions outstanding in such gas producing states as California, Texas, Oklahoma and Louisiana, to mention the prominent producing states, all of which Hinshaw exemptions are affected to some degree by the decision below.

In *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 721, 92 S.Ct. 1827 (1972), this Court considered the question whether the Federal Power Commission had jurisdiction over the Green System-East of sufficient importance to grant certiorari to the Fifth Circuit. There this Court held that the question of the FPC's jurisdiction was within that agency's primary jurisdiction subject to review under the Natural Gas Act. Petitioner now seeks that review.

The decision of the Fifth Circuit sought to be reviewed is erroneous in several respects.

Concentrating only upon the Hinshaw question, however, one may describe the Court's error as the addition of a judicial gloss to the statute without justification. Section 1(c) of the Natural Gas Act states that its provisions *shall* not apply to any facilities used by any person engaged in

the transportation or sale in interstate commerce of natural gas:

i) "received by such person"

ii) "from another person within or at the boundary of a State"

iii) "if all the natural gas so received is ultimately consumed within such State"

iv) "provided that the rates and service of such person and facilities be subject to regulation of a State commission".

The Court of Appeals has made a serious basic error of interpretation. Petitioner is not contending that United should not be subject to the jurisdiction of the FPC. But the Hinshaw Amendment provides for exemption of a person *or* facility from the jurisdiction of the Commission. LGS predicates its argument solely upon the effect of the Hinshaw Amendment on facilities.

It is uncontested that the supposed interstate gas received by United for transportation in the Green System-East is received wholly within the boundaries of the State of Louisiana. There is no contravention of the showing that all of this gas is consumed in Louisiana.

The Court of Appeals did not predicate its decision upon any alleged lack of jurisdiction of the Louisiana Commission. Indeed, such a basis would have been clearly erroneous since the Louisiana Commission has jurisdiction of the rates, service and facilities of United's Green System-East precisely to the same extent that the FPC has jurisdiction of an interstate system. The argument advanced by

United and the FPC, but not accepted by the Court, that recognition of United's Green System-East as exempt would create a lacuna in regulation rests upon the suppressed premise that the FPC has jurisdiction of direct sales. By virtue of this Court's decision in *Federal Power Commission v. Lousiana Power & Light Company*, 406 U.S. 721, 92 S.Ct. 1827 (1972), it is true that in fact the Commission does exercise *control* over direct sales as part of its authority to regulate *transportation* of natural gas, nonetheless this *de facto* control cannot and should not be construed as giving the FPC jurisdiction over direct *sales*. Such a construction would be nothing other than an amendment of the Natural Gas Act to alter its express exclusion of jurisdiction over direct sales to include such jurisdiction. Such an amendment would be the prerogative of Congress, not the courts.

The decision of the Court of Appeals with respect to the Hinshaw issue was predicated solely on the ground that United did not receive the supposed interstate gas from another person at the place required by the statute:

> [U]nder § 1(c) . . . the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits into the facility in the first instance. In effect the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same "person".
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> * * *
>
> By virtue of the flow of interstate gas from the Black System into the Green, the Green System-

> East has ceased to be an intrastate facility and has become, instead, a local branch of an integrated interstate pipeline. In all its relevant parts, this system is operated by one person: United. At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points—the points at which the exemption must take effect, if at all—the "person-to-person" requirement simply is not met.

The court's requirement of a person-to-person interchange at the very point of interconnection with a jurisdictional system is contrary to the act. The language of the Hinshaw Amendment describes the place where the gas must be received from another person as "within or at the boundary of a State." The test given for whether such distribution facilities must be Hinshawed is one of "*ultimate*" consumption within the State wherein the gas is received, *not* that of immediate disposition of the gas.

Nothing in the legislative history cited by the Court of Appeals supports its theory of the necessity of a "person-to-person requirement" being met at precisely the point where the gas passes from a jurisdictional interstate facility to an exempt one. Indeed, the remarks of Senator Bricker in support of the bill and in opposition to a criticism of Senator Burke, quoted by the Court of Appeals to establish that Congress did not intend to exempt local branches of an integrated interstate system and apparently referred to by the Court of Appeals in attempting to establish its theory of the point of interchange, point up that a "person-to-person requirement" at the point of interchange would do nothing to accomplish the intent of Congress. Such a requirement would promote the artificial creation of separate corporate entities by pipeline com-

panies to place themselves under whatever regulatory regime they deem most favorable.

The conclusion drawn by the Court of Appeals from the legislative history, in addition to being a complete *non sequitur*, is also not in accord with the FPC's own application of the Hinshaw exemption in other cases, where the FPC gave effect to the principal thrust of the legislative history, to exempt those facilities which do carry gas in interstate commerce from FPC jurisdiction where operation of the facility is of primarly local concern. Thus, in the *Mountain Gas Company* case the FPC rejected the argument that one who did not receive all his gas from "another person" could not fall under the Hinshaw exemption. 42 FPC 305, affirmed 42 FPC 310 (1969), affirmed *sub nom. P.S.C. of West Virginia v. F.P.C.*, 437 F.2d 1234 (4th Cir. 1971). To proceed from assigning the "person" language virtually no importance in *Mountain Gas* to bestowing upon it here a hypertechnical construction makes little sense. The net result of the Court's opinion below, given the practice of the Commission in other cases, even those involving United Gas Pipe Line Company, is to permit the type of corporate legerdemain that the Court of Appeals conceded Congress intended to avoid. The Green System-East is indistinguishable from the Pennzoil facilities recognized as exempt by the Commission in 1970, except that United elected to place those facilities under the ownership of a separate corporate entity of the same corporate family. See *Pennzoil Pipeline Company*, Docket No. CP 70-102 and *United Gas Pipeline Company*, Docket No. CP 70-103, 44 FPC 291-295.

The error of the Court's interpretation of the Hinshaw Amendment is even more apparent in the concrete application of it to the Green System than as an abstract legal

proposition. Most of the gas contended to be injected into the Green System is said to come at points I and J. At both points United takes gas at the tailgates of process plants (owned by Getty Oil at Point I and Humble at Point J) and runs the gas through about 93 feet of valves and meters, before splitting the gas into two streams, one of which goes to the interstate Black System and the other to the Green System. (See diagram, Exhibit 29, reproduced in Appendix "C" hereto at A-98.)

If the gas is deemed to have become a commingled stream of interstate and intrastate gas, and therefore interstate, before being injected into the Green System-East, United must be deemed to have received the gas before the point of injection, that is, at the very tailgate of the process plant because only under those circumstances would the gas be in an interstate facility. But in that case United has taken gas from another person at the point of receipt. *Therefore the gas would meet the so-called "person-to-person requirement" of the Court of Appeals.* But, on the other hand, if the point of receipt not be deemed to be the very tailgate of the process plant, but instead the point of connection with the Green System, then the gas had not yet been placed in interstate commerce. In that case, there is no need for a Hinshaw exemption because the Green System-East is indeed intrastate.

The Court of Appeals erroneously characterized the purpose of the Hinshaw Amendment as "to preserve state control over local distributors who purchase gas from interstate commerce." An examination of the case which the Hinshaw Amendment was designed legislatively to overrule, *Federal Power Commission v. East Ohio Gas Company*, 338 U.S. 464 (1949), proves that the Court's characterization of the purpose of the Hinshaw Amendment is simply wrong.

Even before the adoption of the Hinshaw Amendment, § 1(b) of the Natural Gas Act provided that the jurisdiction of the Federal Power Commission did not extend to local distributors of natural gas. But in the *East Ohio Gas Company* case, *supra*, the Supreme Court held that § 1(b) did not exempt those who transported interstate gas within a state in high-pressure pipelines extending beyond particular localities. The facilities of East Ohio Gas, which cannot be logically distingushed from the type of facilities operated by United as the Green System-East, became subject to Commission jurisdiction under the case.

The summary of the policy and purpose of the Hinshaw Amendment, given by its sponsor, Senator Bricker, 100 Cong. Rec., Vol. 48, pp. 3042 *et seq.*, March 15, 1954, makes it plain that the purpose of the Hinshaw Amendment was to overrule *East Ohio* and return control of such facilities to the states. By giving § 1(c) a narrow interpretation which deprives it of any operative meaning in addition to § 1(b), the Court of Appeals ignored what Congress stated the law *is* in favor of what that Court thinks the law should be. But as this Court pointed out in *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 721, 92 S.Ct. 1827, "a need for federal regulation does not establish FPC jurisdiction that Congress has not granted."

If any pipeline facility should be Hinshawed, and Congress has determined that some should be, surely it should be that facility which delivers natural gas within and to the very state which produces it. Placing the gas carried by that facility in interstate commerce results in a severe misallocation of resources. Unlike the situation in Northern states, there is no regular distribution system established in Louisiana for fuel oil. If LGS is to be deprived of the gas

going into the Green System-East by being curtailed in its supplies of natural gas from that system and not permitted to service its resale customers—homes, apartments, hospitals, schools, and commercial establishments—it will be more economical and indeed essential to seek additional supplies of intrastate gas by building its own additional transportation facilities. But these will be duplicative of those already existing. The net effect is a reduction in low cost BTU's delivered to the consumer and waste of available transportation facilities which even now have unused capacity. The cost of the unused capacity of United will be passed on to the consumer in the North just as the cost of the additional pipeline facility in Louisiana will be passed on to the Louisiana consumer. The Hinshaw Amendment was designed to prevent such senseless duplication.

CONCLUSION

This case represents the first opportunity for interpretation and clarification of § 1(c) of the Natural Gas Act, the "Hinshaw Amendment." In light of the National Energy Crisis, a settling by this Court of the reach of the Hinshaw Amendment is both desirable and essential. We respectfully urge the Court to grant this petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 1973 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to all counsel of record for the parties.

/s/ Archer P. Carter

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Natural Gas Act, 15 U.S.C. §717

(Section 1)

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interestate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that

the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

Natural Gas Act, 15 U.S.C. §717(r)

(Section 19)

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall

deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order

such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646 § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947.

Administrative Procedure Act, 5 U.S.C. §556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order

issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Administrative Procedure Act, 5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B—OPINIONS BELOW

Opinion of the Court of Appeal

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185, and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC., and CITIES SERVICE OIL COMPANY, ET AL,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Revie wand Set Aside Opinions and Orders of the Federal Power Commission

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(June 28, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This case is another in the long-running and seemingly endless saga of "Who Gets The Gas?", starring the major oil companies, the natural gas pipelines, major industrial users of natural gas, and the Federal Power Commission. Also featured, albeit in some-

what of a bit part, is the individual gas consumer, "the little lady at the burner tip". Although possibly suited for short subject treatment, this proceeding has now become a full-length feature of epic proportions. Basically it is this court's task to consider petitions for review of FPC Opinions 610 and 610-A, in which the Commission took jurisdiction over a formerly intrastate pipeline in Eastern Louisiana. There are many parties with numerous underlying themes to present. From this confusion we must review whether or not the FPC correctly handed out the awards.

In Opinion 610, the FPC found that due to the injection of interstate gas, the formerly intrastate pipeline known as the "Green System-East" was now subject to FPC jurisdiction. Despite all the many different methods used by the petitioners in stating the issues, there are basically only two points for us to consider in reviewing the Commission: (1) Was the FPC correct in holding that the Green System-East had become sufficiently interstate to confer exclusive federal jurisdiction? (2) Even if the system would be otherwise an interstate pipeline subject to jurisdiction, had Congress expressly withdrawn federal jurisdiction for a pipeline such as this by enactment of the Hinshaw Amendment to the Natural Gas Act?

Also, in Opinion 610, the FPC found federal jurisdiction over United's Purple System, another formerly intrastate pipeline. While the majority of the petitioners challenge only the existence of federal jurisdiction over the Green System, two petitioners, Cities Service and Gulf States Utilities, challenge the characterization of the Purple System as interstate. The nature of each of these pipelines will be considered separately below.

The Green System-East

The Green System-East, a natural gas pipeline owned by United Gas Pipe Line Company, is physically situated entirely within the State of Louisiana in United's New Orleans division. For several years prior to October 1, 1970, when United filed an application for FPC certification for the Green System-East, these facilities had been operated as an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. At this point it is necessary to note that the Green System-East is connected through systems of valves with other pipelines, including United's Black System which is an interstate pipeline. It appears that all the gas which goes into the Green System-East is produced in Louisiana gas fields, although at some point some of this gas may be carried in pipelines which also carry gas dedicated to the interstate market. There exists a heated debate as to whether any gas once placed in the Green System-East can or does ever leave the State of Louisiana. These factual matters are basic to the holding of jurisdiction and will be considered in detail *infra*.

Prior Proceedings

The Green System-East has been involved in a significant chain of court opinions. Petitioner, Louisiana Power & Light, previously brought suit in the United States District Court for the Western District of Louisiana seeking a determination of the intrastate character of the Green System-East. The district court, 332 F.Supp. 692 (1971), dismissed the suit, holding that the issue of the nature of the Green System-East was within the primary jurisdiction of the FPC.

On appeal, we reversed the district court, disagreeing that it was necessary to await Commission action. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326. This court went on to address the issue of the Green System-East's interstate character and held that any interstate gas which had been introduced into the system was so minimal in amount that federal jurisdiction had not attached.

In *Federal Power Commission v. Louisiana Power & Light Co.*, ____ U.S. ____, 32 L.Ed.2d 369 (1972), the Supreme Court reversed this court and agreed with the result reached by the district court. Noting that the FPC was conducting hearings of its own in this regard, the Court held that while the agency's decision would not be the last word, it must be the first. The FPC has now reached its decision, finding that the Green System-East is sufficiently interstate to be jurisdictional. It is that "first word" of the agency which we now must review and issue, if not the last word, at least the "next word".

I.

Before proceeding to the merits of the controversy, it is helpful to have a firm picture of the various parties engaged in this litigation and their respective interests in its outcome. It is also important to understand the practical effect of FPC jurisdiction on the parties.

The petitioners can be divided into basic groups. The major oil companies have an interest in the outcome both as sellers and purchasers of natural gas. Several smaller distribution companies which purchase gas from United and the Green System are also challenging the Commission decision. Of course, the petitioners include several state

regulatory agencies charged with the duty of regulating pipelines which are intrastate in nature. Public utilities which purchase natural gas for resale are involved as parties, as are various towns, parishes and municipalities, both as gas purchasers and representing the public interest. Basically, the effect of federal jurisdiction over the Green System-East will have a similar effect on each of these parties, although not to the same degree.

The petitioners, quite naturally, paint themselves as the heroes of this piece, denominating United as the villain and the FPC as conspiratorial bedfellow or, at the least, stooge of United. In giving depth to this characterization of United, the petitioners seek to show United as a greedy, over-reaching and somewhat callous corporate giant out to gorge itself at everyone's expense. The accuracy of this picture, they say, is made crystal clear by the results which will flow from FPC jurisdiction in this case.

These horrors which petitioners feel will flow from FPC jurisdiction are basically twofold. First, the switch from Louisiana Public Service Commission regulation, which, with regard to direct sales is virtually non-regulation, to FPC regulation will permit United to abrogate numerous long-term contracts which it has entered in the past for deliveries of gas to gas purchasers. The importance of this benefit can be seen immediately. Many of these contracts have several years yet to run. They were negotiated in the days when the supplies of natural gas appeared to be endless and, thus, contracts for extremely long terms, such as 20 years, were considered good business, sewing up a customer for the future. Of course, as we all know, with the rise of environmentalism which stressed the importance of natural gas as an essentially "clean" fuel and the realization that natural gas reserves and availability

have been drastically over-estimated, this country has been plunged into an "energy crisis". This "crisis" seems especially acute in the natural gas industry, possibly because of the greater demands for the fuel. Thus, what gas is available can be sold and indeed will be sold for substantially higher prices on today's market than a pipeline could realize under the old long-term contracts entered years ago. Even regulated prices would be substantially higher than the old contract rates, and it must be remembered that the FPC does not regulate the price of sales to direct customers such as large industries but only sales where ultimately the gas will be resold.

Secondly, the gas shortage has led to the necessary allocation of priorities and rationing of this limited supply of natural gas. Through what is popularly called "curtailment", pipelines are allowed to file, subject to Commission approval, plans of allocation of the available gas, basically to ensure that gas goes not to the highest bidder but to those who need it most in the public interest. FPC jurisdiction, thus, also brings in the almost certain result of curtailment of deliveries, even contractually agreed to deliveries. See *International Paper Co. v. Federal Power Commission*, 5 Cir. 1973, ____ F.2d ____ [No. 71-3531, slip opinion dated February 7, 1973].

The parties who sell gas to United for the Green System-East are also worried that if the Green System-East is held interstate they will be in a difficult contractual situation because the gas they are using to fill United's needs is restricted in many cases to the intrastate market only by contracts with those having the gas rights. Thus, they fear that they will have to use other gas to service the Green System-East.

Viewing this situation, the petitioners present United as out after the "fast buck". They allege that United was perfectly willing to be regulated, or in some cases not regulated, by the Louisiana Public Service Commission until it became evident to United that it was to its distinct financial advantage to come under FPC jurisdiction. They further suggest that to obtain Commission jurisdiction, United improperly and perhaps illegally injected interstate gas into the Green System-East, as it could do because of the interconnecting valves, solely for the purpose of creating an argument for jurisdiction to present to the Commission.

United, for its part, seeks to reverse these roles and cast itself as the "good guy". United presents a picture of greedy private industries wishing to gobble up all available gas for their own selfish use, to the detriment of other consumers and the public in general. United claims that any diversion of interstate gas into the Green System-East was because it was absolutely necessary to meet contract deliveries. United supports the Commission finding as in the best interest of the consuming public. Agreeing with United on this point, at least as far as its consumers go, is the Public Service Commission for the State of New York. New York intervened, alleging its fear that United would divert substantial amounts of gas dedicated to the interstate market, including New York consumers, to fill these Green System-East contracts unless the federal authorities exercised control.

Thus, the battle line is drawn and, as usual, the dispute is not over gas alone, but also money. In reviewing the Commission's opinion, we must put away these self-serving charges and countercharges and look to the legal issues of the requisites for federal jurisdiction. In light of the

Supreme Court's directive in *Louisiana Power & Light Co.*, supra, our task must begin with the FPC's decision.

II.

Opinions 610 and 610-A

The first question which the FPC faced in entertaining United's request was whether or not the Green System-East was indeed a jurisdictional pipeline. Noting that none of the interconnections at which United alleged interstate gas to have flowed into the Green System had been certificated by the Commission, the FPC stated that "the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the . . . facilities". In its presentation, United had marked a map of its system showing the points at which interstate gas had been injected into the Green System. The amounts of gas injected at each of these points, as found by the Commission, are set out in the margin.[1] Having found that gas which ultimately found its way into the Green System had at one time been transported in a pipeline which carried interstate gas even though all

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[1](b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated LiretteMobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

the gas was produced within Louisiana and had never physically been outside the state,[2] the Commission went ahead to decide whether or not the amount gave it jurisdiction.

The Commission found that the amounts involved were substantial and were sufficient to give the Commission jurisdiction. On peak days for 1970 and 1971 which were chosen, the Commission figures showed that 153,376 Mcf and 189,846 Mcf, respectively, flowed into the Green System-East. The Commission rejected a *de minimis* argument made by several of the petitioners stating that the interstate portion of the gas on peak days represented 7.79 percent of the requirements and on an annual basis, 2.39 percent of the requirement.[3] Several of the parties

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22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

[2]This is in dispute, but it is clear that some gas once carried in the Green System-East ends up in an *interstate* pipeline owned by Mid-Louisiana, but in all probability this gas does not physically leave Louisiana.

[3]Adjustments raise these figures to 10.7% and about 3.4%, respectively.

dispute these findings made by the Commission, especially the holding as to the total amount introduced into the Green System-East. We will discuss these points in more detail later in the opinion.

Viewing the total picture presented by all the various factors in the record before it, the FPC found that the Green System was an integrated part of United's interstate (or Black) system and that the Green System-East could no longer be left to state regulation as a purely intrastate pipeline. We note that the Commission somewhat retreated from its suggestion that Green System gas flowed out of the State of Louisiana in a physical form. In Opinion 610-A, the FPC stresses that its finding that Green System gas is introduced into Mid-Louisiana's pipeline is simply to show that it is commingled with gas which has moved in interstate commerce. This factor, according to the FPC, gives support to its holding that the Green System has become integrated with interstate systems even though the gas itself never flows out of the state.

The FPC went on to hold that jurisdiction was not to be determined by the amounts of gas involved. They held that jurisdiction attached wherever even an infinitesimal amount of interstate gas was injected into the system. For these purposes, the Commission defines interstate gas as any gas which had ever been carried in a certificated interstate pipeline.

Section 1(c) of the Natural Gas Act, commonly known as the Hinshaw Amendment, provides an exemption from federal regulation wherever all the gas received by the system is to be consumed wholly within the state. The

Commission refused to apply the Hinshaw exception, apparently finding that the Green System-East was an integrated facility and part of the United's total system.

Relying on *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), and this court's Florida Parishes opinion, *Louisiana Public Service Commission v. FPC*, 5 Cir. 1966, 359 F.2d 525, the FPC held that there had been sufficient commingling of intrastate and interstate gas to require that the Commission take jurisdiction over the Green System-East. The Commission also expressly rejected the argument that United had illegally and improperly introduced interstate gas into the Green System-East. First, it found the amounts injected were necessary to meet contract commitments, but, more importantly, stated the existence of jurisdictional facts controlled no matter what the motive.

Commissioner Carver dissented from Opinion 610. His primary reason for dissenting was his feeling that this circuit's opinion in *Louisiana Power & Light v. United Gas Pipe Line Co.*, 456 F.2d 326, which had not yet been passed on by the Supreme Court, was controlling and that the Commission was bound by *res judicata*. In his remarks, Commissioner Carver criticized the Commission for failure to take account of what he felt were the obvious reasons that United was now seeking Commission jurisdiction. He pointed out that the long-term industrial contracts were no longer beneficial to United because of the low rate structure and impending supply crisis. He also referred to the protected curtailment that United had previously sought from the Commission. See *International Paper Company v. FPC*, 5 Cir. 1973, ... F.2d ....., [No. 71-3531, slip opinion dated February 7, 1973]. He further stated:

> Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands.

Following the petitions for rehearing, the Commission issued Opinion 610-A. In this opinion, the Commission retreated somewhat from its conclusion that Green System-East gas flowed out of the State of Louisiana. The Commission also attempted to clear up several other statements in Opinion 610 which were questionable. Commissioner Carver again dissented. He points out that the retreat as to Green System-East gas flowing out of the State of Louisiana undermined the entire finding of jurisdiction. Furthermore, he objected to the majority's use of "official notice" in considering flow charts not made a part of the record in the case without giving the parties an opportunity to present analysis of those flow diagrams. Commissioner Carver concludes that the interstate gas which does flow into the Green System-East is so minimal and insignificant that the Commission should not take jurisdiction.

III.

At the outset, we note that the FPC has apparently decided to treat the entire Green System, formerly known as Green System-East and Green System-West, as a single unit for purposes of determining the existence of federal jurisdiction. In the past the Green System-East has been that part of United's New Orleans division facilities lying east of United's Napoleonville-Kosciusko interstate pipeline system. There is no abrupt stopping point for Green System gas when it reaches the Napoleonville-Kosciusko line; it simply continues to flow on toward the Baton

Rouge area, but with the pipe denominated the Green System-West. Apparently this artificial division has been allowed to exist unchallenged for a number of years. In the past this one continuous pipeline has apparently been treated, for certification purposes, as two separate entities. The Green System-West has long been certificated while the Green System-East has been considered totally intrastate. As Commissioner Carver points out in his dissent to Opinion 610:

> However, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit, free of Federal regulatory impact, and free to contract in any manner it chose, consistent with State law.

In Opinion 610, however, the FPC indicates that at this time the whole New Orleans facility, the entire Green System, must be considered as a unit.

The FPC, in finding jurisdiction, relies heavily on the fact that gas which must be denominated interstate gas flows into and out of the Green System. The flow charts used by the Commission for the year 1969 show that 5,419,519 Mcf of gas were supplied from interstate lines into the Green System-East, that part of the Green Sys-

tem east of the Napoleonville-Kosciusko line. Aside from a minuscule and irregular injection of less than 14,000 Mcf at Point "K", this entire volume of gas was injected at Points "I" and "J". The FPC found that this gate was interstate in nature because it was taken from a commingled stream of gas designated for the interstate market. Both Points "J" and "I" present similar factual situations since they both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading to United's interstate system, the other into the Green System-East.

The Commission also held that substantial quantities of interstate gas were delivered into the Green System at Points "L" and "M", which are both located west of the Napoleonville-Kosciusko line in the Green System-West. At Point "L" over 38,000,000 Mcf is delivered into what is known as the Willow Glen Loop. This loop is also supplied with almost 7,000,000 Mcf directly from the Green System-West and it should be noted that this exit for Green System gas is located very close to the alleged breakpoint between the Green System-East and the Green System-West and that this injection of almost 7,000,000 Mcf is over three-fourths of the total volume which the so-called Green System-East delivers to the so-called Green System-West. At Point "M", the Napoleonville-Kosciusko line delivers approximately 2,000,000 Mcf into the so-called Green System-West. This 2,000,000 Mcf joins with the almost 2,000,000 left after delivery to the Willow Glen Loop and, with various further receipts and deliveries in the so-called Green System-West, continues on to the end of that pipeline for exchange into Mid-Louisiana's interstate pipeline for transportation and sale within the Baton Rouge area. It should be noted that the

Mid-Louisiana line contains interstate gas flowing in from Mississippi.

Based on these injections and commminglings of interstate gas into and within the Green System, the Commission found that it had jurisdiction over the entire system. In its opinion, the FPC noted that, even without consideration of Points "L" and "M", after adjustments, about 3.4% of the Green System-East's annual requirements were supplied from these interstate gas sources. For the peak day of January 6, 1970, the adjusted figures did show that 10.7% of the flow into the Green System-East facilities was injected from interstate gas. The Commission expressly found that these quantities are not *de minimis*. The Commission expressly found that without these injections of interstate gas there would have been a serious deficiency to serve the New Orleans area. Furthermore, the Commission found that this deficiency will seriously increase in the next few years, especially during the peak winter months, with the result that more and more interstate gas would have to be diverted to satisfy commitments. Thus, the Commission has explicitly held that the interstate injections are not minimal in amount nor are they of a temporary nature. Rather, the Commission feels that the amounts were significant, especially on peak days, and that continued delivery of interstate gas will be necessary to fill contractual obligations on the Green System-East.

Several, but not all, of the petitioners attack the Commission's use of a commingling theory based on *People of the State of California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC v. Amerada Petroleum Corporation*, 379 U.S. 687 (1965); and most especially, our decision

in *Louisiana Public Service Commission v. FPC*, 5 Cir. 1966, 359 F.2d 525 (commonly called Florida Parishes). In seeking to distinguish these cases the petitioners rely on this court's opinion in *Louisiana Power & Light Company v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326, in which we held that "the flow of gas from the Black System into the Green System in the case at bar is occasional and irregular as well as minimal". Id. at 339. The petitioners stress that our conclusion in that case was based on substantially the same evidence presented to the Commission and that we must now reach the same result.

As previously noted, the Supreme Court vacated that part of our opinion referred to above which held that there was no FPC jurisdiction over the Green System-East. 32 L.Ed.2d at 389. The Court held that the determination of jurisdiction was for the FPC in the first instance with our role limited to the normal processes of judicial review under the Natural Gas Act.

The Federal Power Commission was set up by Congress to bring a degree of regulatory expertise to the problems of regulating the transportation and consumption of natural gas, as well as other forms of energy. Because of their familiarity with the area in which they operate, the Commissioners are able to make substantially more accurate judgments than courts would be. Here the Commissioners have found that the injections of gas of an interstate character are not minimal and irregular, but are indeed substantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments. Because of our prior holding, it is almost certain we would not reach the same conclusion as an initial matter. However, ours is not to substitute our judgment for that

of the FPC on an issue where that body's intimate knowledge of the specific problems is concerned. We feel that determinations as to the amounts and constancy of the flow and their characterization in terms of impact and necessity therefor, once made by the Commission, cannot be lightly set aside by a court. In *Louisiana Power & Light* we were admonished by the Supreme Court to give the Commission the first chance to determine its jurisdiction in this case. The Commission has found that the Green System-East is a part. of United's integrated interstate pipeline system and that the amounts involved are not minimal. In making this latter determination, the Commission expressly considered and rejected the position of this court in *Louisiana Power & Light* as it applied to the facts found. Disagreeing with our holding that the injections were minimal, the FPC pointed out that the peak day injections were sufficient to heat over 100,000 homes. Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, Administrative Law Treatise §30.05.

Among other things, the Commission found that any amount of interstate gas would give jurisdiction. The opinion seems to suggest that one molecule would be sufficient to automatically confer federal control. We do not reach or consider that issue in this opinion. It appears to this court that there would clearly be times when the amounts of natural gas involved would be so irregular and minimal that Commission jurisdiction would be absurd. However, as noted, the Commission has found that such is not the case as to the Green System-East and we find that to reverse the Commission on this point would simply

be substituting our own judgment for that of the Commissioners, a luxury that we do not possess under our limited review.

Thus, we find we must sanction those parts of the FPC's Oponions 610 and 610-A which establish federal jurisdiction over the Green System as an interstate pipeline. We are somewhat troubled by the assertion of Commissioner Carver and several of the petitioners concerning United's motive in obtaining FPC jurisdiction. However, we do not feel that we have any available way to step in and sort out the competing inequities and reach what would be the fairest result for all concerned. That is the job for the Commission, and it is for the Commission to decide how to balance competing equities or how to penalize "unclean" parties in appropriate cases.

We would point out that federal regulation is not to be considered a plaything to be turned on and off to suit a pipeline's financial advantage. We feel confident that the FPC would not allow itself to be so used and are certain that courts would not allow such a practice to continue. Despite the innuendo and insinuation in this case, we see no direct evidence to support these suggestions of improper motive and conduct.

IV.*

The Hinshaw Amendment

Section 1(c) of the Act (the "Hinshaw Amendment") describes certain persons and facilities whose participation in the transportation and sale of gas in interstate commerce is "primarily of local concern and subject to regula-

*Judge Bell authored Part *IV, The Hinshaw Amendment*, for the court.

tion by the several States". 15 U.S.C. § 717(c). Under § 1(c) these persons and facilities are exempt from the jurisdiction of the Commission.[4]

In the proceedings before the Commission the petitioners maintained that even if the gas transmitted through the Green System-East were interstate in character, the Commission would not have jurisdiction over it because the Green System-East falls within the provisions of § 1(c). The Commission held that the Green System-East is not an exempt facility within the meaning of that section. The petitioners contend this holding was erroneous. We disagree.

Congress enacted the "Hinshaw Amendment" to preserve state control over local distributors who purchase gas from interstate pipelines.[5] Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems.

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[4]The text of the provision is the following:

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulations by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

[5]The amendment was necessary because of an early decision of the Supreme Court which, in construing the scope of the Commission's jurisdition over the transportation and sale of gas "in interstate commerce", held that interstate gas does not lose its interstate character in the hands of local distributors who buy gas for resale and ultimate consumption within the state. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268. (1950).

We discern this intent in the legislative history. During the debate in both houses, supporters of the measure were at pains to emphasize that the proposed exemption was not for the benefit of interstate pipeline companies. See, e.g., 99 Cong. Rec. 10569-70 (remarks of Congressmen Hinshaw, Harris, and Yates). Critics of the measure suggested that the exemption would provide interstate pipelines with a means of defeating federal jurisdiction over portions of their operations which deliver gas for consumption wholly within a single state. One senator suggested that if an interstate pipeline placed one of its state-wide delivery systems under the control of a wholly owned subsidiary and delivered gas to the subsidiary at the state line, the local system would qualify for exemption under the terms of the bill. See 100 Cong. Rec. 3173 (remarks of Senator Burke). Senator Bricker, one of the sponsors of the bill in the Senate, vehemently denied this:

> "[T]here is no intent to place any pipeline company outside the jurisdiction of either the Interstate Commerce Commission or the Federal Power Commission.
>
> "As soon as such a pipeline company were formed, it would come within the jurisdiction of the Federal Power Commission.
>
> "This measure is not an effort — and I make this statement for the RECORD — to remove such companies from the jurisdiction of the Federal Power Commission. If such an interpretation is made, it is without basis or support or foundation upon anything stated at any of the committee hearings." *Id.*

The congressional intent not to exempt local segments of integrated interstate pipeline systems from regulation by the Commission finds clear expression in the language of the statute. Thus, under § 1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be consumed within a given state or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same "person".

In the present case we are not called upon to define with precision the degree of independence that must exist between the person who gives and the person who receives gas at or within state lines in cases where the exemption is warranted. Nor need we consider the propriety of the Commission's prior determinations with regard to the availability or non-availability of the exemption in other cases. Under any plausible reading of the "other person" requirement, the Commission's determination in this case must be sustained.

By virtue of the flow of interstate gas from the Black System into the Green, the Green System-East has ceased to be an intrastate facility and has become, instead, a local branch of an integrated interstate pipeline. In all its

relevant parts, this pipeline system is operated by one person: United. At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points — the points at which the exemption must take effect, if at all — the "person-to-person" requirement simply is not met.

Petitioners contend, however, that the requisite exchange from one person to another need not occur at the points where the exemption must take effect. They say that the person-to-person requirement may be satisfied by exchanges occurring at other points in the network of distribution or supply. Specifically, they claim that in this case the requirement may be satisfied by various exchanges that occur between the Black System and certain independent procedures "upstream" of the points of connection between the Black System and the Green, or by various exchanges between the Green System and certain independent intrastate producers "downstream" of these points of connection.

The legislative history makes it clear, however, that in the contemplation of the supporters and the critics of § 1(c) the exchange between the two persons described in the statute took place at a point where an exemption was necessary to protect the receiver from federal jurisdiction that would otherwise exist under the *East Ohio* decision.[6] In other words, the point of the person-to-person exchange was a point where exemption was needed, and it was the point where the proposed exemption was to take effect. See the Senate and House debates, *supra*.

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[6]See Footnote 5.

Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green System-East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the points of connection between the Black System and the Green — the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

The logic of a technical requirement that identifies the point of exemption with the point of the requisite exchange is apparent on the facts of this case. The contributions by independent producers of interstate gas downstream of the points of connection between the Black System and the Green, or the contributions of interstate gas upstream of these points, do nothing to change the fact that the Green System is now a local branch of an integrated interstate system. Given Congress' overriding intent not to bifurcate the regulation of such system, these contributions should not enhance the Green System's eligibility for exemption under § 1(c). Under our interpretation of the person-to-person requirement, they do not.[7]

The Purple System

The "Purple System" is a pipeline system in United's Lafayette district in southwestern Louisiana. This pipeline system, like the Green System-East, has long been considered an intrastate pipeline not subject to Commis-

[7]Because we decide the Hinshaw issue on this ground, we need not consider the other grounds asserted by the Commission as a basis for its refusal to recognize the allegedly exempt status of the Green System-East.

sion jurisdiction. Two parties, Cities Service Oil Company and Gulf States Utilities Company, challenge the FPC's holding of federal jurisdiction over the Purple System.

The FPC, without dissent as to these facilities, made specific findings showing that the Purple System is unquestionably an integrated part of United's interstate system. At Point "A", United obtained gas for the Lafayette facilities by exchange with an interstate transmission line of Texas Eastern Transmission Corporation. At Point "B" on the system map, United obtained over 1,000,000 Mcf on an annual basis from an interstate line of Texas Gas Transmission Corporation. At Point "C" on the flow chart, United delivered, on an annual basis, over 24,000,000 Mcf to Penzoil Pipeline Company for transportation across the Louisiana line into Texas. At Point "D", United received over 1,000,000 Mcf from Tennessee Gas Pipeline Company's interstate pipeline. At Point "H", over 16,000,000 Mcf were supplied into two streams, with a little over one-half being delivered into one of United's interstate pipelines for transportation out of the state, and the remainder used in the intrastate system. Finally, at Point "O", Tennessee delivered over 22,000,000 Mcf on an annual basis to United's Purple facilities which were commingled with locally produced gas and use in the Lake Charles area.

These facts amply establish that the Purple System is an integrated pipeline facility with many connections and exchanges of gas with interstate facilities. Gas clearly flows out of this system for interstate markets at Point "C". Significant volumes of gas from interstate facilities are introduced into the Purple System for local sale.

Cities Service attempts to distinguish the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases by stating that all the facilities used for transportation for delivery to Cities Service at its refinery are located in Louisiana and all of the gas used at the Cities Service plant originates at production points or exchange points within Louisiana. Cities Service alleges that this makes the pipeline system purely intrastate.

On the contrary, we feel the evidence clearly establishes that this Purple System is part of an integrated pipeline network involving significant transportation of interstate volumes. We feel that the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases cannot be distinguished successfully. We will not "lop off" certain parts of the otherwise integrated system to create an artificial intrastate pipeline.

For the reasons set forth above, the result reached by the FPC in Opinions 610 and 610-A with regard to jurisdiction over the Green System and Purple System is

AFFIRMED.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1972

Nos. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

FPC No. CP71-89
LOUISIANA POWER & LIGHT COMPANY, and
TEXACO, INC. and
CITIES SERVICE OIL COMPANY, ET AL,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Louisiana Power & Light Company and Texaco, Inc., and Cities Service Oil Company, Et Al for review of orders of the Federal Power Commission of the United States, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the Federal Power Commission are hereby affirmed:

It is further ordered that petitioners pay to respondent-intervenor, United Gas Pipe Line Company the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1973

Issued as Mandate:

Denial of Rehearing of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185, and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and
TEXACO, INC., and
CITIES SERVICE OIL COMPANY
ET AL.,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion June 28, 1973, 5 Cir., 1973, ____ F.2d ____).

(September 5, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

Opinions of the Federal Power Commission

DC-51

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
John A. Carver, Jr.,
Albert B. Brooke, Jr.,
Pinkney Walker, and
Rush Moody, Jr.

United Gas Pipe Line Company

Docket No. CP71-89

OPINION NO. 610

OPINION AND ORDER FINDING JURISDICTION AND REMANDING PROCEEDING FOR RECEIPT OF ADDITIONAL EVIDENCE

(Issued February 9, 1972)

NASSIKAS, Chairman:

1. United Gas Pipe Line Company (United) filed on October 1, 1970, an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing certain operations, sales and services. Specifically, United seeks to have added to its existing certificated system two large service areas in Louisiana and a few sales for resale and services in Texas. United avers that it now seeks to obtain a certificate authorizing the aforementioned operations, sales, and services because of the Commission's holding in the *Florida Parishes* case[1] to the effect that the commingling in transmission facilities of gas moving in interstate commerce with local or intrastate gas makes the operation of the facilities, as well as the sales and services rendered by means of such facilities, subject to the Commission's jurisdiction.

2. A hearing was held in this proceeding from June 7,

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[1] *United Gas Pipe Line Co.*, 30 FPC 560 (1963), *aff'd sub nom. Louisiana Public Service Commission v. F. P. C.*, 359 F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966).

1971, through June 18, 1971.[2] At the conclusion of the hearing United moved for omission of the intermediate decision procedure and that motion was granted by the Commission's order issued July 2, 1971. Thereafter, 17 parties filed initial briefs and 16 submitted reply briefs.[3] Since this order is in the nature of an interim decision pending the receipt of additional evidence upon remand, which we order herein, the arguments of the parties will not be referred to herein except in a few minor respects. The oral arguments requested by some parties are denied because the deficient record would make the holding of oral argument nonproductive at this stage of the proceeding.

JURISDICTIONAL ISSUE

3. The first issue to be resolved is whether the Commission has jurisdiction over the operation of the facilities involved and over the sales and other services being rendered by means of such facilities. That question must be determined on the basis of the gas flow in the areas concerned as shown by the evidence.

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[2]The following parties have intervened in the proceeding: Algonquin Gas Transmission Company; Boise Southern Company; The Parish of Cameron, Louisiana; Town of Carencro, Louisiana; Cities Service Oil Company; Consolidated Gas Supply Corporation; Gulf States Utilities Company; Humble Oil & Refining Company; Laclede Gas Company; State of Louisiana; Louisiana Gas Service Company; The Louisiana Municipal Association; Louisiana Power & Light Company; The Louisiana Public Service Commission; Mid-Louisiana Gas Company; The Public Service Commission of the State of Missouri; Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; Monsanto Company; National Gypsum Company, Scott Paper Company and Stauffer Chemical Company; The City of New Orleans, Louisiana; New Orleans Public Service Inc.; The Public Service Commission of the State of New York; The Ohio Fuel Gas Company and The Manufacturers Light and Heat Company; Shell Oil Company; Southern Natural Gas Company; Texaco Inc.; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Towns of Walker and Livingston, Louisiana; and United Gas, Inc.

[3]On November 2, 1971, the State of Louisiana, Louisiana Municipal Association and Parish of Cameron, Louisiana, filed a motion for permission to file a late reply brief submitted therewith. We have accepted the brief for filing and have considered the arguments made therein.

(1) *Description of Texas Facilities, Sales, and Services*

4. United's evidence shows that it has already received a certificate from the Commission authorizing the construction and operation of all the transmission facilities which it owns and operates in its Victoria Division of Texas. The Victoria Division extends along the Texas Gulf Coast from a point near Agua Dulce to a point northwest of Houston. United's testimony shows that it has never obtained a certificate authorizing the sale of gas from the Victoria Division to distributors which resell the gas in 14 communities, nor has United ever obtained a certificate authorizing it to deliver gas to the 7 direct industrial customers which it serves from its facilities in the Victoria Division.

5. United's flow diagram show that United has a single integrated pipeline system in the Victoria Division. Gas is delivered into the system from numerous gas fields and travels out of the State of Texas in interstate commerce except for deliveries made from the interstate facilities to the 14 communities and 7 direct-sale customers which United seeks authorization to serve.

(2) *Determination of Jurisdiction Regarding Victoria Division*

6. There appears to be no doubt but that the Commission has jurisdiction over the 14 sales for resale and the transportation and delivery of gas to the seven direct-sale customers of the Victoria Division. In *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965), the Supreme Court affirmed the Commission's assertion of jurisdiction over the sale and transportation of gas in *Montana-Dakota Utilities Co.*, 30 FPC 200 (1963). In the *Amerada* case the interstate pipeline company purchased gas at the tail-

gates of three gasoline plants within the State of North Dakota and commingled in the same pipeline gas which was contractually destined for use only within the State with gas purchased from the three plants for use outside of the State. The Commission held that the commingling of the so-called intrastate gas with the gas moving out of the State converted all the sales from the gasoline plants into sales for resale in interstate commerce subject to the jurisdiction of the Commission. In the *Florida Parishes* case *supra* the Commission stated that "* * * The removal of a portion of the gas thus flowing in interstate commerce does not change the gas removed from the stream into intrastate gas" (30 FPC at 563).

7. Since the evidence in this proceeding shows that United purchases gas from many sources for transportation and resale in interstate commerce and commingles the gas traveling to markets outside the State with gas delivered to customers within the State, all sales for resale and deliveries to direct-sale customers within the State are subject to the Commission's jurisdiction under the rationale expressed by the Commission in the *Florida Parishes* and *Amerada* cases.

8. However, the Commission at this time does not believe it would be in the public interest to grant a certificate with respect to the Victoria Division because United's evidence is unclear in some respects. Specifically, United did not make it clear in its exhibits whether it is now rendering some service pursuant to Commission authorization and wishes to have additional sales for resale and services certificated, or whether it is now rendering no service in the Victoria Division pursuant to Commssion orders and now wishes to obtain a certificate covering all sales for resale and services being performed in the Victoria

Division. United's evidence should also clarify whether sales to pipeline companies shown on the flow diagrams have been certificated, whether any of the other deliveries shown on the flow diagrams have heretofore been certificated, and whether the flow diagrams reflect all services and sales being rendered, or only those for which a certificate is requested. United's evidence in the remanded proceeding should show whether the Victoria sales and services have heretofore been included as requirements to be met when presenting gas reserve and deliverability data to the Commission in certificate cases or in the preparation of its Form 15. Additionally, United should present evidence with respect to alternate sources of gas supply for the Victoria customers.

(3) *Description of Louisiana Facilities, Sales, and Services*

9. The certificate which United seeks for Louisiana facilities, sales, and services would not only cover authorization to make sales for resale and deliveries of gas to direct-sale customers, but would also grant authority to operate the facilities by means of which such sales and services are rendered.

10. The facilities involved are situated in that portion of United's service area known as the New Orleans Division which is located entirely in Southern Louisiana south of Marksville, Louisiana. The New Orleans Division is further subdivided into two districts called the Lafayette District and the New Orleans District. The Lafayette District lies in the western part of Southern Louisiana west of Baton Rouge and Napoleonville, while the New Orleans District is situated in the eastern part of Southern Louisiana and includes Baton Rouge and Napoleonville.

11. Since United operates an existing interstate pipeline system in Southern Louisiana under certificates issued by the Commission as well as the facilities comprising the Lafayette and New Orleans Districts, United's evidence includes maps which use three colors to differentiate the various facilities and service areas. The certificated transmission lines are shown in black, the Lafayette District facilities are depicted in purple, and the New Orleans facilities are outlined in green. Throughout this opinion the purple facilities will be referred to as the Lafayette facilities and the green facilities will be referred to as the New Orleans facilities. United's application requests that the Commission certificate the Lafayette and New Orleans facilities and all sales and services rendered by means of such facilities.

12. Although United's Exhibit 1 shows letter designations from "A" through "W" to indicate that there are 24 points where interstate gas enters the Lafayette and New Orleans facilities, none of those interconnections has ever been certificated by the Commission. Thus, the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the Lafayette and New Orleans facilities. Diagrams showing the flow of gas on an annual basis (for the 12 months ending December 31, 1969) were presented by United in support of its belief that the Lafayette and New Orleans facilities are now integrated with its interstate system. The Commission has examined both the annual flow diagrams and the flow diagrams for the peak day of January 6, 1970, which were received in evidence as Item E (Tr. 558). In addition, the Commission has taken official notice of United's flow diagrams for the peak day of March 3, 1971, which were filed July 7, 1971, pursuant to Section 260.8

of the Commission's Regulations under the Natural Gas Act.

13. While United's Exhibit 1 shows 24 points indicating where interstate and uncertificated gas supplies may be commingled, scrutiny of the 12 points which were discussed in the cross-examination of United's witnesses is sufficient to establish that the operation of United's Lafayette and New Orleans facilities are presently subject to the Commission's jurisdiction.

(a) *Flow of Interstate Gas in Lafayette Facilities*

14. At point "A" on Exhibit 1 there is an interconnection between an interstate transmission line of Texas Eastern Transmission Corporation and a Lafayette pipeline lying north of the City of DeQuincy. Since this interconnection is a point at which United exchanges gas with Texas Eastern, the flow diagram shows no annual volumes to be entering United's system, but on the peak day of March 3, 1971, Texas Eastern delivered 105,173 Mcf of which approximately half traveled southeasterly toward the Lake Charles area and the remaining volume was transported northwesterly into the Leesville area.

15. Point "B" on Exhibit 1 is located at an interconnection between Texas Gas Transmission Corporation's interstate line and a Lafayette pipeline near Iowa, Louisiana. On an annual basis Texas Gas delivered 1,371,681 Mcf to United at that point and on the peak day of March 3, 1971, United received 17,636 Mcf from Texas Gas at that point. The gas was commingled with intrastate gas and sold to customers in the Lake Charles area.

16. Point "C" is located on the western boundary of the State of Louisiana southeast of Beaumont, Texas. At that place a Lafayette pipeline interconnects with Pennzoil

Pipeline Company's facilities which transport gas into Texas. On an annual basis 24,254,556 Mcf are delivered to Pennzoil and on the peak days of March 3, 1971, and January 6, 1970, volumes of 1,075 Mcf and 58,399 Mcf, respectively, were delivered to Pennzoil for transportation out of the State of Louisiana.

17. At point "D" United receives gas in the East Cameron Area from Tennessee Gas Pipeline Company's interstate pipeline and such gas is transported along with locally-produced gas to consumers in the Lake Charles area. On an annual basis Tennessee delivered 1,357,396 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 24,079 Mcf and 41,323 Mcf, respectively.

18. At point "H" gas produced in the Lawson field area is delivered into a pipeline extending from Lafayette to Bancroft. Although all of the gas received at this point is produced in Louisiana, the gas is split at the point of delivery so that out of 16,594,766 Mcf received on an annual basis, 9,717,494 Mcf are transported easterly for delivery into one of United's interstate pipelines transporting gas out of the State, while the remainder is transmitted to a market in the Leesville area. On the peak day of March 3, 1971, 38,138 Mcf entered the line and all of it was transported out of the State. Of the 38,429 Mcf delivered from the Lawson field on the peak day of January 6, 1970, 21,395 Mcf were transported out of the State while the remainder was consumed in local markets.

19. At point "O" Tennessee delivers gas to United from its interstate line near Iowa, Louisiana. On an annual basis Tennessee delivered 22,138,127 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 47,919 Mcf and 117,173 Mcf, respectively. The

gas is transported by United with locally-produced gas and consumed by customers in the Lake Charles area.

(b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the

peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

(c) *The Unauthorized Gas Flows Establish Jurisdiction*

26. The foregoing description of the flow of interstate gas in United's Lafayette and New Orleans facilities shows beyond any doubt that United's introduction of substantial quantities of gas into those uncertificated facilities from its interstate gas sources is a suffcient commingling of

interstate and uncertificated gas supplies to bring the operation of the Lafayette and New Orleans facilities, together with the sales and services made from those facilities, within the Commission's jurisdiction under the Natural Gas Act.

27. As indicated in the foregoing discussion of delivery points, on the peak days of 1971 and 1970, interstate volumes of 189,846 Mcf and 153,376 Mcf, respectively, flowed into the New Orleans District facilities. Those volumes would be adequate to heat well over 100,000 single-family residences on a cold day.

28. A *de minimis* argument is advanced by certain parties with respect to commingled gas in that portion of the New Orleans District, referred to as the Green System-East, located east of the Napoleonville-Kosciusko line. New Orleans Public Service Inc. (NOPSI) offered Exhibit 22 showing that deliveries of interstate gas by United into Green System-East represented 7.79 percent of peak-day requirements and 2.39 percent of annual requirements for the 12 months ended July 31, 1970.

29. A comparison of the adjusted flow diagrams upon which Exhibit 22 is based[4] with United's actual flow data on file with Commission, referred to previously, shows that the actual peak-day deliveries from gas supply sources differ from the adjusted flows in almost every instance.

30. At Bastian Bay (point "I") where interstate gas entered the Green System-East the actual volumes shown for the peak day, January 6, 1970, exceeded the adjusted flow by 19,489 Mcf. This increases the percentage of peak-

[4]Exhibit 22 indicates that the source for the data shown therein was United's response to FPC Staff Request No. 38 in Docket No. RP71-41, prepared for United's rate proceeding in that docket, which consisted of flow diagrams captioned "adjusted".

day injections of interstate gas into the Green System-East from 7.79 percent to 10.7 percent. A review of the same data with respect to the annual volumes of interstate gas flowing into the Green System-East indicates that the 2.39 percent should be increased to about 3.4 percent. We find that these quantities are not *de minimis*.

31. Furthermore, United projects the peak-day demand in the New Orleans-Baton Rouge area to be at a level of 1,002,000 Mcf during the 1971-72 winter period with a projected intrastate supply of only 413,000 Mcf (Tr. 91-92). Accordingly, United shows that there is a peak-day deficiency in gas supply 598,000 Mcf which is contends must be supplied by interstate sources. On the basis of this evidence, there would be a substantial gas supply deficiency in the City of New Orleans area, within the Green System-East, of approximately 448,000 Mcf per day during the 1971-72 winter heating season which would be met with volumes from interstate sources transported through certificated interstate facilities. Moreover, United contends that this deficiency[5] will increase for the peak day of the 1972-73 winter heating season and that it will be necessary for United to increase its deliveries into the Green System-East if that system is to remain on a parity with all other systems.[6]

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[5]A question has been raised as to whether a producer affiliate of United has gas available, which can be delivered into either interstate or uncertificated facilities, in sufficient quantities to meet the New Orleans District's deficiencies and thereby obviate the need for United to obtain gas from its interstate sources. Even assuming that the Commission sanctions such an arrangement we find no evidence to support that proposition; to the contrary the evidence in the record indicates that on peak days gas from interstate sources in volumes of about 600,000 Mcf will have to be introduced into the New Orleans District. To test the possibility of obtaining gas in those quantities from Lirette sources, we have examined both the Form 15 and System Flow Diagram reports filed pursuant to our regulations. The data from those sources show that the peak-day flows from Lirette to *any* destination would fall short of meeting the requirements by several hundred thousand Mcf.

[6]See also Exhibits 3 and 34.

32. Mr. Echterhoff testified at Tr. 91-92 that the peak-day deficiency of intrastate reserves for meeting the needs of the New Orleans District would be 684,000 Mcf in 1972-73, *i.e.*, the requirements were 1,018,000 Mcf and the "intrastate" reserves were 334,000 Mcf. Thus, 67.2 percent of the peak-day requirements would have to come from *interstate* sources.

33. If the Green System-East (or New Orleans area by itself) is isolated from the Willow Glen-Baton Rouge area, the needs for the New Orleans area by itself amount to 542,000 Mcf. The deficiency would be made up by obtaining interstate gas from the Bastian Bay-Lirette-Mobile system.

34. Testimony in the record of the case reveals that the peak-day deficiency on the Green System would result in approximately 70 percent curtailment of the Green System, including the New Orleans distributor — the company upon which human needs customers depend. To test this testimony, we have taken notice of the filings required by our regulations.

35. The peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations as well as the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities. We examined the peak-day flow diagrams for several reasons. First, it is important in this proceeding to understand the impact on United's existing interstate customers resulting from deliveries of gas to the New Orleans and Lafayette Districts on peak days because those volumes are illustrative of the extent of curtailments to United's existing customers which will be necessary in

order for the uncertificated markets to be served on cold days. Second, Section 157.14(a)(8) requires the submission of peak-day flow diagrams as a part of all certificate applications in order to show the applicant's ability to serve its proposed customers on the day of maximum demand. Third, the Commission normally examines peak-day flows in determining jurisdiction. See, *e.g.*, *Florida Parishes*, *supra*, 30 FPC at 564, and *Amerada*, *supra*, 30 FPC at 203. Fourth, some of the parties had relied on Exhibit 22 showing peak-day flows based on flow diagrams which were introduced in United's rate proceeding in Docket No. RP71-41, and it was appropriate that the Commission examine peak-day flow diagrams which reveal actual flows of gas on the peak day rather than the adjusted flows which were utilized in the flow diagrams submitted in the rate proceeding.

36. We have examined all available data in finding that the uncertificated facilities, as well as the sales for resale and transportation services rendered thereby, are subject to the Commission's jurisdiction. In addition, the annual flow diagrams which were a part of the record reveal that gas flows out of the Green System-East.

37. The testimony (Tr. 326) indicates that point "M" is at the extreme west end of the Green System-East. At that point 8,256,920 Mcf left the Green System-East and entered the Green System-West and of that volume 6,879,259 Mcf were transported toward Willow Glen while the remaining 1,377,661 Mcf were transported toward Baton Rouge and commingled with 2,055,759 Mcf of interstate gas delivered into the Green System-West from the Napoleonville-Kosciusko interstate pipeline. The commingled stream of Green System-East and interstate gas there-

after was used to serve markets in Louisiana and ultimately provided 2,054,190 Mcf at point "U" for delivery to Mid Louisiana Gas Company's interstate pipeline which extends out of the State of Louisiana.

38. The importance of examining both annual and peak-day flow diagrams becomes obvious from the foregoing illustration because the peak-day flow diagram for March 3, 1971, shows that 22,811 Mcf were transported out of the Green System-East into the Green System-West but were thereafter commingled with interstate gas and wholly used in the Willow Glen area. Although 38,557 Mcf were delivered to Mid Louisiana on that day at point "U", none of the Green System-East gas is shown to be flowing beyond the Willow Glen pipeline. Of course, gas does flow out of the Green System-East on both a peak-day and an annual basis, but the Green System-East gas does not appear to flow out of the State of Louisiana except on an annual basis.

39. We have considered the volumes delivered at all points in our discussion with respect to the flow of gas in the Lafayette and New Orleans Districts. Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities. It is unnecessary for us to separate interconnection points in the Green System-East from those related to the Green System-West because the New Orleans District is situated in the eastern part of Southern Louisiana and *includes* Baton Rouge and Napoleonville.

40. As previously stated, we have considered the actual peak-day volumes as set forth in United's flow diagrams filed pursuant to Section 260.8 of our Regulations and the adjusted volumes which were shown on the flow diagrams

presented in United's rate case in Docket No. RP71-41 that were used by the witness sponsoring Exhibit No. 22 from which the 2.39 percent commingling figure is obtained.

41. In addition to the adjusted volumes used in United's rate proceeding in Docket No. RP71-41, it should be noted that if we had referred to the flow diagrams submitted by United in its most recent rate proceeding in Docket No. RP72-75, we would have been provided with data showing that much larger volumes of gas are to be transported on both a peak-day and annual basis into the Green System-East. To be specific, instead of a zero volume entering the Green System-East at point "J" on the peak-day of March 3, 1971, the adjusted figure would be 86,766 Mcf, and instead of 72,990 Mcf entering the Green System-East at point "I" on the peak-day of March 3, 1971, the adjusted figure would be 108,371 Mcf. Similarly, instead of an annual volume of 2,119,631 Mcf entering the Green System-East at point "J", the adjusted figure would be 1,371,196 Mcf, and instead of an annual volume of 3,286,-407 Mcf entering the Green System-East at point "I", the adjusted figure would be 11,024,446 Mcf. Since the adjusted figures used in Docket No. RP72-75 are attempting to estimate volumes for the 1971-72 heating season, they indicate that the Green System-East is expected by United to become increasingly reliant upon deliveries from United's interstate facilities in order to meet the uncertificated market's gas requirements.

42. In determining the jurisdictional issue, however, we do not believe that the relative level of the volumes involved are controlling. Section 1(b) of the Act does not delimit the amount of gas to be transported or sold in

interstate commerce necessary for the exercise of Commission jurisdiction.

43. The case of *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U.S. 515, 535-36 (1945), arising under the Federal Power Act, is instructive in this regard. There the Supreme Court, addressing itself to a *de minimis* argument, stated:

> Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state * * *
>
> Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is over-extending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

44. Our decision herein is in accord with *Federal Power Commission* v. *Florida Power & Light Co.* (U.S. Supreme Court No. 70-38, decided January 12, 1972, ____ U.S. (____ 40 LW 4141) wherein the Supreme Court held that an electric utility was subject to the jurisdiction of this

Commission because energy transmitted by it was commingled with energy transmitted by a jurisdictional company. There the issue was whether any energy was transmitted in interstate commerce *at all.* As the Court stated the test is not how much, but whether; "* * * no matter how small the quantity, FPC jurisdiction will attach because it is settled that Congress has not 'conditioned the jurisdiction of the commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction'" (Slip Op., p. 9, n. 10). The dissent noted that the commingling is minuscule and incidental.

45. The Louisiana Public Service Commission and several other parties contend that the Green System-East should be exempted from Commission jurisdiction under Section 1(c) of the Act.[7] The argument is made that to the extent some volumes of interstate gas have been delivered into the Green System-East such gas has been received, transported, and consumed wholly within the State of Louisiana, and that since the rates, services and facilities of the Green System-East are regulated by the Lou-

[7]Section 1(c) of the Act reads as follows:

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State comission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

isiana Public Service Commission, the requirements for exemption under Section 1(c) have been met. United maintains that Section 1(c) is inapplicable since the Louisiana Public Service Commission may not regulate direct sales,[8] and that granting an exemption under Section 1(c) would leave a regulatory gap.

46. Staff opposes an exemption on additional grounds. It dismisses initially the assertion that Section 1(c) is self-executing and that no application therefor nor showing in support thereof need be made, citing the provision in the Section requiring an evidentiary showing with respect to State commission jurisdiction. Section 1(c) is applicable, argues Staff, only "* * * if all the natural gas so received is ultimately consumed within such State", and that is not the case with all the gas received by United from other persons in Louisiana, *e.g.*, deliveries from the Getty plant at Bastian Bay. It also contends that the "from another person" requirement of the Section is overlooked by those seeking an exemption.

47. The proponents of the Section 1(c) exemption agree that United's Green System-East receives gas from United's system, but seek succor by citing the case of *Mountain Gas Company*, Docket No. CP68-303, and *Cabot Corporation*, Docket No. CP68-176, 42 FPC 305, *aff'd sub nom. Public Service Commission of West Virginia* v *F. P.C.*, 437 F.2d 1234 (4th Cir. 1971) for the proposition that the gas need not be received "from another person"

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[8]Art. 6, Sec. 4 of the Louisiana Constitution as amended in 1964, provides in pertinent part that: "* * * the [Public Service] Commission shall have no power or authority to supervise, govern, regulate and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in such sale of natural gas."

as plainly set out in Section 1(c). In our view *Mountain Gas* is inapposite since most of the gas there in question was purchased from another person.[9] Noting that Section 1(c) is applicable solely "to any person engaged in or legally authorized to engage in the transportation of gas in interstate commerce," Staff additionally asserts that the arguments of the parties favoring exemption are inconsistent with their contention that the Green System is an entirely separate intrastate entity. This apparent inconsistency has no bearing on our determination of this question, as we reject the tortured reasoning which would artifically maintain a division of the integrated facilities of United's system. We find that a Section 1(c) exemption does not obtain in the circumstances presented.

48. The Louisiana Commission does not regulate any aspect of direct sales and thus, in any event, an exemption would not be available, even to a separate pipeline company.[10] This Commission, on the other hand, has substantial regulatory authority over the service of gas to direct customers. Deliveries to direct customers cannot be made without a certificate from this Commission and the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of those transactions.[11] In addition, the Commission, pursuant to

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[9]In that case part of the gas was received by Cabot from its own wells at some of the facilities proposed to be exempted. The bulk of the gas, however, was purshased from Tennessee Gas Pipeline Company.

[10]We take official notice of a letter to this Commission, dated June 16, 1971, in which the Chairman of the Louisiana Public Service Commission indicates that the Louisiana Commisson does not exercise jurisdiction over direct sales to industrial customers. We note that 1(c) exemptions have been previously granted within Louisiana. See *Central Louisiana Electric Co., Inc.*, Docket No. CP62-129, 27 FPC 374 (1962); *Unted Gas Pipe Line Co.*, Docket No. CP68-203, and *Sugar Bowl Gas Corp.*, Docket No. CP68-204, 39 FPC 619 (1968). However, we note that in each case that there was no disclaimer of jurisdiction by the Louisiana Public Service Commission, as in this case.

[11]*Panhandle Eastern Pipe Line Co. v. F. P. C.*, 232 F.2d 467, 471 (5th Cir. 1956).

Section 7(b), must determine whether service to a direct customer or any other customer should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. While the absence of State regulation is not material to a determination of our own jurisdiction; it nevertheless follows that the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State and therefore contribute measurably to the regulatory process.

49. We recognize, however, that the State purports to regulate sales for resale in the New Orleans and Lafayette Districts. While our assertion of jurisdiction herein would substitute Federal regulation for State regulation over such sales, the substitution of Federal regulation occurs simply as a consequence of our determination that these sales are in interstate commerce and the fact that State regulation will be affected has no bearing on our determination. Moreover, the exercise of our jurisdiction over sales and services in interstate commerce does not impinge upon State regulation of sales and services by the distributors receiving gas from United.

50. In declining to grant United and exemption under Section 1(c) of the Act, we are aware that such an exemption was granted in *United Gas Pipe Line Co.*, Docket No. CP66-137, 35 FPC 172. However, that case involved a sale for resale over which the Louisiana Public Service Commission asserted jurisdiction; moreover, the gas was purchased from Transcontinental Gas Pipe Line Corpora-

tion, "another person" within the meaning of Section 1(c), and the facilities involved were not connected with United's interstate system. The present case is clearly distinguishable inasmuch as it involves direct sales, over which the Louisiana Public Service Commission has disclaimed jurisdiction, the gas is not purchased from "another person", and the facilities involved are directly connected to United's interstate system.

51. It is argued that United deliberately introduced interstate gas into the New Orleans District to bring about the situation that exists in order to serve its own interests with respect to its direct-sale contracts and curtailment plans. The alternative that this argument suggests is that the Commission should order United to desist from making any further deliveries into the New Orleans District. With the exception of two producers, no party to this proceeding suggests this course of action. It appears from the record that were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak-day requirements.[12] Moreover, as we have noted herein, the Green System-East will have a considerable deficiency in its peak-day gas requirements for the current winter heating season, as well as for the next heating season. Thus, the jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination.[13]

52. We believe that no extended discussion of the applicable law is required in support of our jurisdiction under the circumstances presented. The Commission's opinion in *Lo-Vaca Gathering Co.*, 26 FPC 606 (1961),

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[12]See Exhibit 22.

[13]See *Western Union Telegraph Co. v. Speight*, 254 U.S. 17 (1920); *Price v. Western Union Telegraph Co.*, 156 Fla. 406, 23 So.2d 491 (1945).

aff'd sub nom. California v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), followed by the Supreme Court's *Amerada* and the Fifth Circuit's *Florida Parishes* opinions *supra*, leaves no room for argument that the commingling of interstate gas with intrastate gas and the delivering of gas to intrastate markets from interstate pipelines are sufficient integration of interstate and intrastate operations to bring the uncertificated sales and facilities within the Commission's jurisdiction. As the court pointed out in the *Florida Parishes case* (359 F.2d 525 at 528):

> * * * The facts in each of those cases [*Lo-Vaca* and *Amerada*] more strongly supported the argument for state jurisdiction over the gas produced, gathered, transported and sold in the same state than do the facts of this proceeding. In each instance, however, the Supreme Court held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction "at the outset over the entire transaction".

53. We wish to make clear that the facilities, sales, and services in question became subject to our jurisdiction at such time as the commingling of interstate and intrastate gas took place. The Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural-gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956), *cert denied*, 352 U.S. 971 (1956). *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349 (2nd Cir. 1971), *cert. denied*, ____ U.S. ____ (Sup. Ct. No. 70-216, October 12, 1971).

54. Although there is sufficient evidence in the record

to find jurisdiction, we believe that certain aspects of United's operation of its facilities in the area in question require amplification. In the remanded proceedng United should present an Exhibit K setting forth the lengths and diameters of pipelines and other facilities in the Lafayette and New Orleans Districts for which it seeks certification. The original cost of all facilities should be shown together with accrued depreciation thereon.

55. During the cross-examination it appeared that United has previously obtained certificates to make sales from some of the uncertificated facilities. For example, although United seeks to have its Weeks Island pipeline certificated in this proceeding, the Commission issued on June 26, 1968, an order in *United Gas Pipe Line Co.*, 39 FPC 1029, certificating a sale to Humble Oil & Refining Company from that pipeline. Moreover, despite the fact that the order specifically restricts deliveries of gas to Humble to a maximum of 3,500 Mcf per day, Exhibit 17 indicates that United has delivered up to 7,010 Mcf per day to Humble at that point. Likewise, the Commission has apparently certificated some facilities near the lateral line serving Baton Rouge, but United's witness was not clear as to what those facilities were or whether they are still used for the purpose for which they were originally certificated.

56. United should also include in Exhibit K a separate break-down of the facilities comprising the 24 interconnections at which interstate gas may be injected into the Lafayette and New Orleans facilities. Inasmuch as United claims that increasing quantities of interstate gas will be needed to supply the Southern Louisiana market, it should explain where the increased quantities of interstate gas

will be obtained and which of the 24 interconnections will be used for that purpose.

CERTIFICATION ISSUES

(1) *Introduction*

57. As set forth in its opinion in *Kansas Pipe Line & Gas Co.*, 2 FPC 29 (1939), the Commission has considered five primary factors in determining whether a certificate of public convenience and necessity should be issued. Those five factors are whether a market for the gas has been shown, whether there is a gas supply available to serve the proposed markets for a time sufficiently long to justify the construction of the facilities, whether the facilities proposed to be constructed are adequate from an engineering point of view, whether the proposed sales will return sufficient revenues to enable the applicant to recover the cost of service involved in rendering the proposed sales and services, and whether the applicant will be able to obtain the financing necessary to construct the proposed facilities. United's application in this proceeding is unusual in that the facilities for which it seeks a certificate have already been constructed, the markets have already been attached, the gas is already flowing, the facilities have already been financed, and proposed rate increases covering the sales involved are presently pending before the Commission.

58. Although the Lafayette and New Orleans Districts contain existing pipeline systems now in operation, those systems were constructed many years ago and have been operated as independent intrastate pipeline systems entirely separate from United's integrated interstate system over which the Commission exercises jurisdiction. Therefore, when United filed its application requesting that the

Commission issue a certificate covering all the facilities, resales, and services being rendered in its Lafayette and New Orleans Districts, it was obligated to present evidence showing that the attachment of those facilities, resales, and services to the interstate pipeline system is required by the public convenience and necessity. While we recognize that with existing facilities certain conventional data may be omitted, we note certain deficiencies in the record as outlined below which should be the object of an additional evidentiary presentation.

(2) *Markets*

59. United's market evidence consisted of a tabulation of its resale and direct-sale customers showing the largest volumes which they have taken on non-coincidental peak days, but United failed to show what volumes it is obligated to deliver to its customers under the most recent service agreements and direct-sale contracts. Since United is operating under the curtailment provisions of its tariff at the present time,[14] any certificate issued should contain volumetric limitations in accordance with the Commission's Statement of Policy in order No. 431 issued April 15, 1971, in Docket No. R-418. Therefore, in the remanded proceeding United should present as part of its market evidence copies of the service agreements which it has most recently negotiated with its resale customers. If United's gas supply deficiency prevents it from proposing to deliver contractual volumes to its resale and direct-sale customers, it should make a separate tabulation of the actual volumes it expects to deliver in light of its current gas supply situation.

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[14]United is currently involved in a curtailment proceeding before the Commission in Docket No. RP71-29, *et al.*

(3) *Gas Supply*

60. Since United is now curtailing deliveries to its customers, the Commission assumes that United has a deliverability of less than one year, but United did not present any evidence which would permit the Commission to evaluate the impact on the existing interstate customers that would result if the Commission were to certificate the service proposed to be continued in the Lafayette and New Orleans Districts. Therefore, United's gas supply evidence should show the volumes of gas which will be available to serve the existing interstate markets with and without the markets in the Lafayette and New Orleans Districts. Inasmuch as United claims that a much greater quantity of interstate gas will be needed to serve the Lafayette and New Orleans Districts within the next two or three years, its deliverability exhibit should project the impact on the existing interstate market if it were to be permitted to provide service from its interstate system to all of its customers in the Lafayette and New Orleans Districts.

61. United's shortage of gas raises the possibility that authorization of markets in the Lafayette and New Orleans Districts will result in the taking of disproportionate volumes of gas from existing industrial customers now being served with the gas supply previously committed to serving only interstate markets. Therefore, United's deliverability study should show to what extent the deficiencies in gas supply alleged for the Lafayette and New Orleans Districts are based upon the requirements of industrial customers as compared with the needs of residential and commercial customers.

62. A question in this proceeding is whether customers who were being served from what has previously been an

entirely separate intrastate system with its own gas reserves should now be allowed to continue to purchase gas from a gas supply which presumably was not committed to serving an uncertificated system and its customers.

(4) *Engineering Feasibility*

63. United's evidence consisted of flow diagrams showing net movement of gas on only an annual basis. The Commission has compensated for United's failure to present peak-day flow diagrams by examining the diagrams for January 6, 1970, which were received in evidence as Item E and by taking official notice of the flow diagrams for the peak day of March 3, 1971. At the remanded hearing the peak-day flow diagrams for March 3, 1971, should also be received in evidence as an item by reference to the Commission's files.

64. The Commission normally evaluates engineering and economic feasibility on the basis of the third-year volumes of gas to be served in a proposed market. Since United has previously served the Lafayette and New Orleans Districts with gas from fields located fairly close to the markets, it is essential that United show how increasing quantities of gas can be introduced into the Lafayette and New Orleans facilities so that the Commission will know whether additional facilities will have to be constructed to transport gas from interstate gas sources to market in the Lafayette and New Orleans Districts.

(5) *Economic Feasibility*

65. To the extent that United addressed itself to the question of economic feasibility, it shows that the certificate should be denied because it claims that the direct-sale

customers which are presently attached to the Lafayette and New Orleans facilities are noncompensatory since the rates in some of their contracts with United are so low that they do not cover United's average cost of purchased gas.

66. The Commission has for many years conditioned certificates to require pipeline companies and industrial customers to modify their contracts to remove "escape" clauses therefrom.[15] There have been instances where the Commission conditioned a certificate authorizing the expansion of a pipeline company's existing system upon the procurement of firm contracts with industrial customers to assure the economic feasibility of the proposed expansion.[16] In the remanded proceeding, if it is determined that the service United is rendering to industrial customers is non-compensatory, and if the certificate were otherwise required by the public convenience and necessity, the Commission could consider granting the certificate conditioned to assure that the allocable cost of service to the direct industrial customers is recovered.

67. Before the Commission can determine economic feasibility, however, United should present an economic feas-

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[15]In Houston Texas Gas & Oil Corp., 16 FPC 118 (1956), *aff'd sub nom. Florida Economic Advisory Council v. F. P. C.*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958), the Commission conditioned the certificate issued to require removal of clauses in contracts which would have permitted electric companies to pay transportation rates based on the competitive cost of oil. In *Northern Natural Gas Co.*, 22 FPC 164 (1959), *aff'd sub nom. Minneapolis Gas Co. v. F. P. C.*, 278 F.2d 870 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960), the Commission required a pipeline company to remove from its direct-sale contracts with electric companies clauses which would have permitted the electric companies to stop purchasing gas if the price of coal should become cheaper than the cost of gas.

[16]*Midwestern Gas Transmission Co.*, 22 FPC 775 (1959, *aff'd sub nom. Michigan Gas and Electric Co. v. F. P. C.*, 290 F.2d 374 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 897 (1961), *Northern Natural Gas Co.*, 30 FPC 859 (1963), and *Southern Natural Gas Co.*, 31 FPC 789 (1964).

ibility study showing the cost of service allocable for the Lafayette and New Orleans Districts. Such a study should show the deficit, if any, which would result from serving both resale and direct-sale customers in the Lafayette and New Orleans Districts.

68. Gulf States Utilities Company presented Exhibit 24 which indicates that United's full cost of service in the entire New Orleans Division (which includes both the Lafayette and New Orleans Districts as well as United's *interstate* transmission lines) ranges from 3.4 to 4.5 cents per Mcf exclusive of the cost of purchased gas. However, Gulf States' exhibit needs to be refined so as to allocate only to the Lafayette and New Orleans Districts that portion of the cost of the interstate pipelines which should appropriately be assigned to those areas. Despite the unrefined nature of its evidence, Gulf States shows that the rate in its direct-sale contract with United fails to pay United's full cost of service associated with serving Gulf States' generating plants. The Commission must determine whether to certificate direct sales which do not pay their full share of the cost of service.

69. In presenting its economic feasibility evidence in the remanded proceeding, United may utilize the same rates of return and depreciation which were employed in its last rate increase filings in Docket No. RP72-75. Use of such rates in a certificate case is illustrative of the highest costs the existing and proposed customers may have to pay and makes its possible to test the economic feasibility of proposed new service in light of rates being proposed for service to existing customers.

70. The foregoing discussion shows that the evidence

in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity. We shall, therefore, remand the proceedings to the Presiding Examiner as hereinafter provided. Our determination that the Commission has jurisdiction over United's operations in the Victoria and New Orleans Divisions, however, requires that we address ourselves to the status of United's existing services in these Divisions pending the Commission's determination of the certificate issues.

71. In the absence of the issuance of a certificate at this time, we have two alternatives with regard to the existing service provided by United pending a Commission determination on remand: (1) the immediate termination by United of deliveries into the systems in question, or (2) the continuation of deliveries of interstate gas into these systems on an emergency basis pending final disposition of this matter.

72. Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970-71 heating season and, based on projections for the 1971-72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District. Moreover, the record does not disclose the impact on United's customers in the Victoria and New Orleans Divisions of an abrupt discontinuation of interstate deliveries into these systems.

73. In view of these facts, we believe that the public interest may best be served by continuation of United's

service to prevent the undue hardship that might result from an immediate termination of interstate deliveries. We shall, therefore, authorize the continuation of such existing deliveries of interstate gas into the Victoria and New Orleans Divisions on an emergency basis, subject to the condition that these facilities be operated as part of United's integrated interstate system fully subject to our exclusive jurisdiction. Thus due to the current shortage of gas on United's system, deliveries to customers in these Divisions shall be subject to the curtailment provisions of United's tariff, pending the Commission's decision in the remanded proceedings, and all other matters, rate or otherwise, shall be subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder.

74. We are aware that the finding of jurisdiction over the New Orleans and Lafayette Districts raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems. We do not consider this question herein. To assure equitable treatment we will permit those producers selling directly to facilities herein declared jurisdictional to file their contracts pursuant to Paragraph 12 of Docket No. R-389A for consideration by this Commission without prejudice to their right to challenge this opinion on appeal and without admitting that this Commission has jurisdiction over the sales in question.

75. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, ____ F.2d ____, the court held that "* * * The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction" (Slip Op., p. 29). Since we respectfully disagree with the legal

conclusion drawn by the court, we are constrained to consider the question of whether this Commission is precluded from making an independent decision based upon the record in the case before us.

76. We have examined the basic authorities on *res judicata* and estoppel by judgment and fail to find any authority for the proposition that an administrative agency charged by Congress to determine its jurisdiction in accordance with the Administrative Procedure Act and the Natural Gas Act must terminate its proceedings when a court, in a collateral suit, reaches the jurisdictional question. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

77. We have considered such cases as *Commissioner* v. *Sunnen*, 233 U.S. 598 (1948), wherein the Supreme Court held the doctrine of estoppel inapplicable to subsequent relitigation by an agency of the same question decided adversely to it in court.

78. In *Otis & Co.* v. *S. E. C.*, 176 F.2d 34 (D.C. Cir. 1948), *rev'd per curiam*, 338 U.S. 843 (1949), SEC brought a suit in the District Court to require certain parties to testify in a concurrent administrative proceeding. Upon the court ruling against SEC, Otis then sought injunctive relief to terminate the administrative hearings. The District Court dismissed the suit and the Court of Appeals reversed. The Supreme Court upheld the District Court dismissal, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), *supra*.

79. In *Federal Water and Gas Corp.*, 188 F.2d 100 (3rd Cir. (1951), the SEC approved a plan which was ultimate-

ly affirmed in the Supreme Court. On subsequent order, the Court of Appeals attempted to modify the agency's order, but the Supreme Court prohibited this. This decision is not in point.

80. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), has no application to this situation since there was no question of forum or primary jurisdiction. The same is true of *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938).

81. In *U. S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), the Advisory Board of Contract Appeals held hearings in which the company asserted claims against the Atomic Energy Commission for additional compensation and time extension. Subsequent to the decision, the respondent brought suit for breach of contract in the Court of Claims which ruled that the factual issues in the controversy should be resolved in a judicial trial. The Supreme Court held that the Court of Claims could review the administrative record, but could not retry the issues, which had properly been before the agency and which the parties had an adequate opportunity to litigate. This case is instructive, since it reflects the deference to administrative proceedings which we have asserted.

82. In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Federal Power Commission issued a license to construct and operate a hydroelectric project. The City petitioned the Court of Appeals on the ground that the City could not act in opposition to a State policy. The Court of Appeals affirmed the Commission's order and the Supreme Court denied certiorari. In regard to the bond issue, the State court enjoined the City and Supreme Court

of Washington affirmed. The U.S. Supreme Court in granting certiorari stated that the bond validation suit was an impermissible collateral attack upon the final judgment of the Court of Appeals in the initial proceeding. There, again, the administrative proceedings were held to be primary.

83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The *LP&L* case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commission to decide the case; — the Commission did not — and could not — take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered.

The Commission finds:

(1) Applicant, United Gas Pipe Line Company, a Delaware corporation having its principal place of business in Shreveport, Louisiana, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of January 20, 1942, in Docket No. G-216, 3 FPC 3.

(2) Un'ted has introduced significant quantities of in-

terstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965.

(3) The Federal Power Commission has jurisdiction under the Natural Gas Act and particularly Sections 2(7) and 1(b) thereof over the facilities, transportation, and sales for resale of natural gas by United by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

(4) United has failed to present sufficient evidence as required by the Commission's Regulations to permit the Commission to evaluate the factors entering into determining whether the certificate of public convenience and necessity requested by United should be issued or granted with conditions.

(5) The proceeding should be remanded to the Presiding Examiner in order to permit United to satisfy the evidentiary deficiencies which have hereinbefore been specified.

(6) United's sales and services within the Victoria and New Orleans Divisions should be continued on an emergency basis pending further order of the Commission in the remanded proceedings.

The Commission orders:

(A) The proceeding in Docket No. CP71-89 is hereby remanded to the Presiding Examiner for receipt of additional evidence to overcome the deficiencies hereinbefore specified.

(B) Within 45 days after issuance of this order United shall file with the Commission and serve upon the Presiding Examiner, all parties to the proceeding, and the Commission's staff the testimony and exhibits required to satisfy the evidentiary deficiencies hereinbefore specified.

(C) Within 30 days after the filing and service of United's evidence all other parties and the Commission's staff shall file with the Commission and serve upon the Presiding Examiner, United, and other participants any evidence which they may wish to present in support of their positions.

(D) Service to all customers in the Victoria and New Orleans Divisions shall be continued on an emergency basis, on condition that United's facilities therein be operated as part of its integrated interstate system, subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in this proceeding.

(E) The hearing in the remanded proceeding shall commence on April 25, 1972, at 10:00 a.m. (EST) in one of the Commission's hearing rooms, 441 G Street, N. W., Washington, D. C. 20426.

(F) The motions for oral argument made herein are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

Kenneth F. Plumb,
Secretary.

CARVER, Commissioner, *dissenting:*

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipe-

line capacity needed markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ____ FPC ____ (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

The preceding observations are merely descriptive of

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[1]Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2]The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: " . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia v. Carroll, et al.* (1950) 338 U.S. 586, 600-602.

the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light* v. *United Gas Pipe Line Company*, cited par. 75, majority opinion *supra*, constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata*, estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present: The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commissioner* v. *Sunnen*, 333 U.S. 598 (1948). (This case is not the same as *FPC* v. *Amerada*

Petroleum Corp., et al., 379 U.S. 687 (1965), because it was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurdisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment," *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA3, 1951), cert. den. *sub. nom. Chenery Corp. et al.* v. *SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits,

[3]In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

Stoll v. *Gottlieb*, 305 U.S. 165, 172 (1938), and enforces repose "not only respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final, *U.S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private law suit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

JOHN A. CARVER, JR.
Commissioner

A-77

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
John N. Nassikas, Chairman;
John A. Carver, Jr., Albert B. Brooke, Jr.,
Pinkney Walker, and Rush Moody, Jr.

United Gas Pipe Line Company

Docket No. CP71-89

OPINION NO. 610-A

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

(Issued April 7, 1972)

NASSIKAS, Chairman:

1. A number of parties[1] have filed applications for rehearing of the Commission's Opinion No. 610 and order, issued February 9, 1972, wherein we found that this Commission has jurisdiction under the Natural Gas Act over the facilities, transportation and sales for resale of natural gas by United Gas Pipe Line Company (United) by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

[1]New Orleans Public Service Inc. and the City of New Orleans (jointly), Texas Gulf Sulphur Company, Boise Southern Company, Texas Gas Transmission Corporation, Louisiana Gas Service Company, Louisiana Power and Light Company, Gulf States Utilities Company, Cities Service Oil Company, Shell Oil Company, Humble Oil & Refining Company, Texaco Inc., and State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission (jointly).

2. Additionally, the State of Louisiana and the Louisiana Public Service Commission request an investigation of alleged violations of "the Natural Gas Act and of Gas Reserves" and move to stay Opinion No. 610 and the remanded proceedings.

3. The applications for rehearing challenge the Commission's assertion of jurisdiction on various grounds, all of which have been considered and treated by the Commission in Opinion No. 610. We do not believe that further discussion is necessary. There have been certain allegations of erroneous factual conclusions, however, to which further comment would be appropriate.

4. Several parties, whose arguments are directed to the Green System-East, contend the Commission erroneously concluded that gas from the Green System-East leaves the State of Louisiana. They argue that there is nothing in the record to show that gas actually flows out of the state and that annual flow diagrams filed as part of FPC Form 2 actually show flows at point "U" going to Baton Rouge. At paragraphs 37 and 38 of the Opinion, we stated that gas from the Green System-East enters the Green System-West, flows into the interstate pipeline of the Mid-Louisiana Gas Company at point "U" and thereafter appears to flow out of the state. In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows.

5. Texaco Inc. asserts that there is an error in paragraph 25 of the Opinion wherein the Commission described

gas flows from the De Large Field. It contends that the Commission erred in concluding that gas entered the Green System-East from the De Large Field. The Commission does not so state in paragraph 25, nor is such a conclusion intended. Despite the fact that the De Large Field gas does not enter the Green System-East, interstate gas including deliveries from the De Large Field is used to serve the Dulac area. Texaco Inc. also notes that the Commission's opinion omits the fact that several small isolated sections of transmission facilities in the Green System-East do not receive commingled flows. This has no bearing on the Commission's general assertion of jurisdiction over the New Orleans Division and is a matter which will be considered at the time that particular facilities are before us for certification.

6. Boise Southern Company (Boise) alleges that Opinion No. 610 contains a substantial misstatement of fact relating to those facilities by means of which it receives its gas deliveries. It notes that, contrary to the Commission's statement in paragraph 12 of the Opinion, the interconnection at point "A" has been certificated by the Commission[2] as was a 12-inch line which interconnected with Texas Eastern's 30-inch line. The only other transmission line used to serve Boise is 6.1 miles of 8-inch line. Boise argues that any assertion of jurisdiction over the 8-inch line should have been made at the time of certification in Docket No. CP67-26, and that in the absence thereof it had the right to understand that no further authorization from the Commission would be required. A review of the Commission's order in Docket No. CP67-26 indicates that certain facilities at point "A" were certificated by the Commission. This

[2]Commission order issued on July 22, 1969, in Docket No. CP67-26 (42 FPC 157).

factual clarification, however, does not give substance to Boise's argument. The fact that additional facilities utilized to serve Boise were not certificated previously does not exempt United's facilities serving Boise from our assertion of jurisdiction.

7. Texas Gas Transmission Corporation's application for rehearing is directed solely to the Commission's order that deliveries by United be continued on an emergency basis pending the conclusion of the remanded proceedings. It urges the Commission to impose interim volumetric limitations on United's customers affected by this case at the levels which correspond to the maximum takes of such customers in the past as reflected in the record. The issue of volumetric limitations upon certification is one that is to be taken up in the remanded proceedings as we believe the record evidence thereon is presently insufficient. In the interim we have provided that such deliveries shall be subject to curtailment in the same manner as United's other customers.

8. Texas Gulf Sulphur Company, which was granted late intervention by Commission order, issued March 31, 1972, asserts that the Commission was in error in not ordering United to cease further violations of the Natural Gas Act. It further contends that the Commission erred in ordering United to amend in any way its direct sales contracts or to make its direct sales subject to United's FPC Gas Tariff without the consent of its direct customers to the application of such tariff provisions or to any changes therein. Contrary to Texas Gulf Sulphur's assertion the Commission has not ordered United to amend its direct sale contracts. In authorizing United to continue its deliveries on an emergency basis we have, however,

imposed certain conditions which we believe are in the public interest.

9. The State of Louisiana and the Louisiana Public Service Commission request an investigation of violations of the Natural Gas Act and of gas reserves alleging that there has been a "deliberate, extensive and wilfull violation by United of the prohibition of Section 7(e) of the Natural Gas Act against any proposed construction of extension of facilities which shall constitute the transportation or sale of natural gas subject to the jurisdiction of the FPC without first obtaining a certificate of public convenience and necessity authorizing such acts or operations." This allegation appears to us to be inconsistent with the position taken by these parties that the Commission does not have jurisdiction over the facilities in question. Nevertheless, in finding the New Orleans Division jurisdictional on the basis of unauthorized gas flows, we stated that the Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. We refrained, however, from issuing a certificate of public convenience and necessity for any of the facilities, sales or services as we found that the record requires amplification. Among the matters to be addressed in the remanded proceedings would be the justification for United's initiation of flows into the New Orleans Division, as well as the requirements of the New Orleans Division for United's interstate flows. The latter would, of course, require a review of gas reserves within the New Orleans Division. Thus, we believe that the remanded proceedings will permit a resolution of these issues. Accordingly, we shall deny the State of Louisiana and the Public Service Commission's petition.

10. The State of Louisiana and the Louisiana Public Service Commission while expressing opposition to the reopening of the record, alternatively request that the record be broadened to include certain information specified in Appendix A of Special Order No. 7/71 of the Louisiana Public Service Commission, issued February 28, 1971. In the remanded proceedings the parties will have an opportunity to present evidence bearing on all issues related to certification. Requests for data may be directed to the Presiding Examiner. As for the motion for stay we do not believe that it would serve the public interest to stay our order and delay the remanded proceedings.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 610 and accompanying Order except as that Opinion is clarified above.

The Commission orders:

(A) The applications for rehearing of the Commission's Opinion No. 610 and order, described herein are denied.

(B) The petition for an investigation of violations of the Natural Gas Act and gas reserves and the motion for stay filed by the State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended.

(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED GAS PIPE LINE COMPANY

Docket No. CP71-89

(Issued April 7, 1972)

CARVER, Commissioner, *dissenting*:

My dissent to Opinion No. 610 was broadly stated as embracing a wide array of legal, policy, and procedural differences with the conclusions of the majority, but refrained from any extensive analysis of those issues because the *res judicata* question seemed so clearly dispositive of the proceeding at that time. I remain of that opinion, but feel compelled to comment briefly on two of the substantive matters raised by certain of the parties in their applications for rehearing and not satisfactorily resolved in this order.

A critical element of the jurisdictional finding is the conclusion that gas flows into *and out of* United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the

document or other factual source is clear on its face. That is not the case here; the conclusions drawn by the majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U. S. Code)[1] and its judicial antecedents.

Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-

[1] " . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence. . . "

Louisiana (point "U") "*appears*" to flow out of the state. This is indeed a flimsy predicate for an action having the drastic consequences referred to in my original dissent. Nor is it clear how gas entering Mid-Louisiana facilities at or near the Baton Rouge city gate can leave the State. As Texaco's application for rehearing states, Mid-Louisiana's line from the Monroe Field extends in a southerly direction and terminates at Baton Rouge. Its function is to carry gas across a corner of Mississippi back into Louisiana. Gas entering that line at point "U" goes only into Baton Rouge and is consumed there.

Until this proceeding at least, the *Florida Parishes* case represented a high water mark in the use of the commingling theory as a jurisdictional rationale. In its very first paragraph, Opinion No. 610 lays the foundation for the conclusion that that case is controlling here. This ignores a whole host of differences in the two situations, only one of which needs mention for present purposes. The question in *Florida Parishes* was whether intrastate sale of incidental amounts of gas taken from a transmission line which was an integral part of an interstate operation required our certification. Here, the facts are diametrically opposite: at most 3 or 4 percent of the volumes carried by an otherwise separate and distinct intrastate facility may have their origin in sources dedicated to the interstate market. To claim that a situation which was concerned with a 100 percent interstate supply source is identical or even comparable with one that is more than 96 percent intrastate is to reduce all problems and issues to the same dimensions. The public interest demands a better sense of perspective on the part of this Commission.

JOHN A. CARVER, JR.
Commissioner

APPENDIX C — MISCELLANEOUS

Motions

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, ET AL
Petitioners

VERSUS

FEDERAL POWER COMMISSION
Respondent

PETITION OF
LOUISIANA POWER & LIGHT COMPANY
FOR REHEARING IN BANC
IN NO. 72-1714

Petitioner, Louisiana Power & Light Company, respectfully petitions this Honorable Court for a rehearing *in banc* of its petition to review and set aside opinions and orders of the Federal Power Commission in the above titled cause, and in support of this petition for rehearing *in banc* represents to the Court as follows:

We reserve our argued position as to each of the points raised in our petition for review, but in this petition for rehearing *in banc* address ourselves solely to that feature

of the decision wherein we believe the Court may be convinced its result is based upon application of incorrect legal principles.

Thus, this petition is devoted to convincing this Court that it has erred in failing to apply the Substantial Evidence Test to the Federal Power Commission's determination that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. By this failure the Court has failed to preserve uniformity in its decisions with respect to a question of exceptional importance. Therefore, we respectfully suggest that this is a matter where a rehearing *in banc* is appropriate.

In *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 456 F. 2d 326 (5th Cir. 1972), this Court held that the channel of constant flow was intrastate in nature, and that any interstate gas which had been introduced into Green System-East was so minimal in amount that federal jurisdiction had not attached. Although the Supreme Court of the United States did reverse this Court on the question of whether it was necessary to await the Commission's own determination of jurisdiction, *the Supreme Court did not reverse those substantive holdings of this Court.* Rather, the Supreme Court simply ruled that this Court should defer to the FPC for the initial determination of jurisdiction subject to "review of the FPC decision . . . in due course pursuant to §19(b) of the Act, 15 U.S.C. §717(b)." *Federal Power Commission v. Louisiana Power & Light Co.*, ... U.S. ....., 92 S. Ct. 1827, 1842 (June, 1972).

Section 19(b) of the Natural Gas Act expressly provides

for the applicability of the Substantial Evidence Test to such proceedings. Identical language in the Federal Power Act was interpreted by the Supreme Court in 1972 as importing the Substantial Evidence Test into review of Federal Power Commission proceedings. *Federal Power Commission v. Florida Power & Light*, 404 U.S. 453, 92 S. Ct. 637 (January, 1972).

On the basis of the same evidence before this Court last year, the evidence upon which the Court then concluded that Green System-East was intrastate, the Court has now ruled that as a matter of law the Green System-East is interstate. This is not the logical consequence of the Supreme Court's ruling. It is a logical consequence of a misapplication of fundamental principles of administrative law.

The Court has this time sustained a finding that the system is interstate on the ground that there is a rational basis to support the Federal Power Commission's finding:

> "Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, *Administrative Law Treatise* §30.05." Slip opinion p. 19.

Davis, the only authority cited by the Court, in the place cited by the Court, discusses this "Rational Basis Test" as a device sometimes used by Courts to avoid a determination of what is a question of fact and what is a question of law. If the Court can avoid making such a distinction, it might be argued that it need not determine whether there is substantial evidence to support the agency's action.

This approach to the Rational Basis Test is not sanctioned by the United States Supreme Court. Under decisions of the Supreme Court, there must be both substantial evidence *and* a rational basis to sustain an agency's action: "Judicial review of this conclusion is limited to consideration of whether it has a rational basis *and is supported by substantial evidence.*" *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 126 (1962), emphasis added.

Avoiding a determination of whether there is substantial evidence to support the agency's determination denies to LP&L the very review which the Supreme Court reserved to it under §19(b) of the Natural Gas Act, 15 U.S.C. §717(b). It also violates the mandate of the Administrative Procedure Act that "the reviewing Court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . ." and that the Court "in making such a determination shall review the whole record. . . ." 5 U.S.C. §706.

The approach taken by this Court this time is directly contrary to the leading case of *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1950). There the Court discussed at length the dissatisfaction with the finality accorded by some Courts to agency decisions "when the reviewing Court could find in the record evidence which, when viewed in isolation, substantiated. . ." the agency's findings. 340 U.S. 478. The case epitomizing the abuse which Congress sought to correct was *N.L.R.B. v. Nevada Consol. Copper Corp.*, 316 U.S. 105 (1942), where the Court sustained an agency's action on the ground that "upon an examination of the record we cannot say that the findings

of fact of the Board are without support in the evidence." 316 U.S. at 107, quoted in discussion by the Supreme Court of the background of the APA in *Universal Camera*, 340 U.S. at 486. Sustaining an action on the ground that it is "not without support in the evidence" is the same as sustaining it on the ground that it is not without a "reasonable basis." Therefore, the approach taken by this Court this time is identical to the approach which the Supreme Court ruled impermissible under *Universal Camera*.

In *Universal Camera* the Court ruled that provisions by Congress for the review of administrative determinations must be read in conjunction with the provision of the Administrative Procedure Act requiring that the Court strike down such agency action if not supported by substantial evidence on the record as a whole:

> "Whether or not it was ever permissible for Courts to determine the substantiality of evidence supporting a . . . decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." 340 U.S. at 487-488.

A finding that there is a reasonable basis for the FPC's position does not meet the test of *Universal Camera*. To say that there is a reasonable basis without finding that there is substantial evidence is merely to say that there is *some* evidence from which an inference may be drawn in support of the agency's finding. If that is all the evidence there is, then this Court's duty under the Administrative

Procedure Act is to strike down the FPC's determination, not to avoid the issue under a claim of limited review. "Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." *Universal Camera*, 340 U.S. at 490.

The choice before the Court this time was not between deciding the matter as though it were before the Court *de novo* or sustaining the FPC's action if some reasonable basis could be found. The choice was to sustain or strike down the action according to *whether there was substantial evidence*. The failure of the Court to discuss any substantial evidence which warranted a different conclusion from that which this very Court had reached in 1972 demonstrates that the Court "cannot conscientiously find that the evidence supporting that decision is substantial." *Universal Camera*, 340 U.S. at 488. Indeed, the statement by the Court that because of its "prior holding" it is "almost certain" that the Court would not reach the same conclusion as the FPC if the determination were less limited than the "reasonable basis" test, is an admission by the Court that no new substantial evidence has been developed sufficient to sustain a finding that the system is interstate.

Accordingly, we urge that a rehearing *in banc* be ordered so that this Court may exercise the responsibility placed in its keeping by Congress to review the actions of administrative agencies, and by so doing restore to its decisions uniformity on this question of exceptional importance.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, ET AL
Petitioners

versus

FEDERAL POWER COMMISSION
Respondent

PETITION OF
LOUISIANA GAS SERVICE COMPANY
FOR REHEARING IN BANC
IN NO. 72-1715

Petitioner, Louisiana Gas Service Company (LGS), respectfully petitions this Honorable Court for a rehearing *in banc* of its petition to review and set aside opinions and orders of the Federal Power Commission. In support of this petition LGS makes the following representations:

LGS reserves its argued position as to each of the points raised in its petition for review, but in this petition addresses itself solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon application of incorrect principles of law.

The thrust of this petition is that the Court has erred in ruling that Congress has not excluded the Green System-East from the jurisdiction of the Federal Power Commission by the enactment of the Hinshaw Amendment to the Natural Gas Act. By so ruling the Court has failed to maintain a uniformity in its decisions in a proceeding involving a question of exceptional importance. Hence, we respectfully suggest that this is a matter where a rehearing *in banc* is appropriate.

In *Louisiana Power & Light Company v. United Gas Pipe Line Co.*, 456 F.2d 326 (5th Cir. 1972), after pointing out that the Green System-East is physically located in and functions entirely in Louisiana, a panel of this Court ruled that its regulation is "substantially and essentially a localized matter committed to Louisiana jurisdiction". 456 F.2d at 339-340. Section 1(c) of the Natural Gas Act (the Hinshaw Amendment) exempts by operation of law from the jurisdiction of the Commission anyone who meets the following requirements:

1. Any person engaged in transportation or resale of natural gas in interstate commerce,

2. Where such gas is received by such person from "another person" within or at the boundary of a State,

3. If all the natural gas so received is consumed within the State, and

4. The activities of such a person are subject to regulation by the State.

It is clear from this Court's 1972 decision that the Green System-East is within the purpose of the Hinshaw

Amendment as a matter of essentially local concern. The essential question before the Court is whether the literal language of the Hinshaw Amendment *compels* a departure from this Court's earlier decision.

We submit that the construction given by this Court to the Hinshaw Amendment is inconsistent with its treatment of the entire Green System as a single unit for the purpose of determining the existence of federal jurisdiction. The crucial part of the Court's reasoning that demonstrates the inconsistency is as follows:

> 'Thus, under §1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who received gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which operated by the same "person." ' Slip Opinion, pp. 23-24.

The fatal flaw in the Court's reasoning lies in its gloss upon the statute to limit the Hinshaw Amendment to *receipt from another person engaged in transmission at the point of interconnection with the exempt facility.* One searches the statute in vain to find any requirement that the exempt facility connect *directly* with another person. So long as the operator of the facility claimed as exempt does in fact receive the gas transported in that facility from another person within the state and the gas is

"*ultimately*" consumed within that state, the Hinshaw exemption is operable.

This time the Court has erred in making a faulty extrapolation from the legislative history of the Hinshaw Amendment. The fact that as a matter of history the occasion which gave rise to the passage of the Hinshaw exemption was one involving the acquisition of gas by a local distributor from one engaged in interstate transmission does not of itself create any limitation in the statute to such circumstances. The test of the limitation of the scope of a statute is that meaning consistent with both its language and its purpose. The language of the Amendment is not limited to instances where acquisition is from those engaged in transmission. It applies where the gas is acquired "from another person within or at the boundary of a State" whenever such gas is "ultimately consumed within such State." The declared purpose of the Amendment is to exempt from FPC regulation those matters primarily of local concern. If a facility which receives its gas from another person engaged in interstate transmission is primarily of local concern, then the same is true a *fortiori* of one who acquires from another person engaged in the production of such gas.

In this case there is no disputing the fact that United is not a producer and purchases all of its gas from *other persons*. The record is perfectly clear that United does not furnish itself any gas or bring any gas into the Green System-East from outside Louisiana, and all of the gas is furnished to United by "other persons", i.e., Texaco, Shell, Gulf, *et al*. The fact that United itself operates the facility by which the gas is transmitted from the other persons who are the producers to the facility which transmits the gas for ultimate consumption within the State does not

alter the status of the facility which transports the gas to interstate consumers under the Amendment.

The construction given by this Court is not necessary to avoid the danger of extending the statutory exemption to local branches of a single interstate system formed by the expedient of an interstate transmitter's placing its statewide delivery systems under the control of a wholly-owned subsidiary. Such bad-faith efforts are defeated by a reasonable construction of "another person" to exclude entities formed for that purpose. The gloss added by the Court to the Amendment to require that there be another person *at the point of delivery* adds nothing to the protection afforded by the language of the Act itself.

Thus, in this case where the operator of a facility used to transport gas for ultimate consumption within a State does acquire the gas from other persons who produce it, the Hinshaw exemption is applicable. The test under the statute is ultimate consumption, not the intermediate mode of transportation. That regulation of the facility in question is a matter primarily of local concern has already been determined by the Court. This is a matter of exceptional importance, and the Court should accordingly grant a rehearing *in banc*.

Respectfully submitted,
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Flow Diagram

EXHIBIT 29

LIBRARY
SUPR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-871

EXXON CORPORATION AND TEXACO INC.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

JOINT PETITION OF EXXON CORPORATION AND TEXACO INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILSON · EPES PRINTING CO., INC. · RE 7-6002 · WASHINGTON, D C 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

EXXON CORPORATION AND TEXACO INC.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

JOINT PETITION OF EXXON CORPORATION AND TEXACO INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Exxon Corporation (Exxon) and Texaco Inc. (Texaco) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 28, 1973.

OPINION BELOW

The opinion of the Court of Appeals in *Louisiana Power & Light Co.* v. *FPC*, is reported at 483 F.2d 623 (5th Cir. 1973), *reh. denied*, 483 F.2d 1404 (1973). The opinions of the Federal Power Commission (Commission), styled *United Gas Pipe Line Co.*, Docket No. CP71-

89, Opinion Nos. 610 and 610-A, were issued February 9, 1972, and April 7, 1972, and are reported at 47 F.P.C. 245 and 1021, respectively. The opinions and orders of the Court of Appeals and the Commission are reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 28, 1973.[1] A timely petition for rehearing was denied on September 5, 1973, and this petition for writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act (Act), 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether in the course of alleviating local gas supply shortage conditions where supplementary gas is introduced into a local gas transmission system, local regulatory jurisdiction over such system is lost despite Section 1(c) of the Act because the supplementary gas so received comes from an interstate pipeline system owned and operated by the same company.

STATUTE INVOLVED

The statutory provisions which are involved in this proceeding are subsections (b) and (c) of Section 1 of the Act, as amended, 15 U.S.C. § 717(b) and (c). These provisions are reprinted in the Appendix hereto.

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[1] The mandate issued with the judgment of the Court below (App. 27a) applies to Texaco Inc. but not as to Exxon Corporation to which a stay of mandate was granted by the Court on September 25, 1973.

STATEMENT OF THE CASE

United Gas Pipe Line Company (United) operates a natural gas pipeline system in several states along the Gulf Coast. Through this system, United serves numerous customers, including distribution companies, industrial consumers, and other pipeline companies. Although United operates its major pipeline system in interstate commerce subject to regulation by the Commission, it has historically operated various of its systems on an intrastate or local basis. For example, a system in Texas which interconnects with United's interstate system has, within the past few years, been separately incorporated in the name of Pennzoil Pipeline Company and its operations have been declared exempt from Commission regulation under Section 1(c) of the Act. In Louisiana, United has historically operated a pipeline system located in the New Orleans-Baton Rouge area as an entirely separate, intrastate system. This system, which is involved in the litigation here, is known as the Green System-East.

Commencing in about 1966, United began interconnecting its Green System-East with its interstate system. These interconnections were not authorized by the Commission and, as acknowledged by the Commission, constituted violations of the Act.[2] Since the Green System-East operates at a lower pressure than United's interstate pipeline system, no gas can flow from the intrastate to the interstate system and all gas, once entering the Green System-East, is consumed within the State of Louisiana.

By letter issued September 17, 1970, the Commission requested United to submit certificate applications covering uncertificated portions of any of its facilities which might be considered jurisdictional under Section 1(b) of

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[2] App. at 34a, 38a-39a, 62a.

the Act.[3] Pursuant to that letter, United filed an application for a certificate to operate its Green System-East and to make sales for resale from that system which, according to United, became jurisdictional by reason of its unauthorized interconnections between the Green System-East and United's interstate pipeline system. Before determining any issues involved in passing upon United's certificate application, such as adequacy of gas supply and economic feasibility, the Commission first set for hearing the question whether it has jurisdiction over the Green System-East. It concluded that movement of what it termed interstate gas into the Green System-East converted the Green System-East from a non-jurisdictional operation to a jurisdictional pipeline system subject to its plenary jurisdiction. The Commission held that Section 1(c) of the Act (the "Hinshaw Amendment"), which exempts interstate operations from federal regulation where all gas received within a state is consumed within the state of receipt, is not applicable despite the fact that all of the gas received into the Green System-East is actually consumed within the State of Louisiana.

On review the Court of Appeals for the Fifth Circuit affirmed holding, among other things, that United's Green System-East is not exempt under Section 1(c) because (App. at 21a):

> "Congress enacted the 'Hinshaw Amendment' to preserve state control over local distributors who purchase gas from interstate pipelines. Congress did not intend the amendment to relieve the Commission

[3] Section 1(b) provides that sales in interstate commerce for resale and transportation in interstate commerce are subject to the Commission's jurisdiction. Section 7(c) requires that no person shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. App. at 1a, 2a.

of jurisdiction over local branches of integrated interstate systems." (footnote omitted)

The lower court's underlying theory that Section 1(c) is applicable only to local distributors and does not exempt qualified portions of interstate pipelines whose activities are local in nature constitutes its fundamental error.[4]

REASONS FOR GRANTING THE WRIT

This petition presents a case of first impression involving review of the scope of the Commission's jurisdiction as delimited by the exemption contained in Section 1(c) of the Act. As such, it constitutes not only a matter of signal importance in construction of the Act, but also it presents an elemental question of the viability of our federal system of government. Basically, the Court must decide whether Congress intended that federal power should supplement or supplant state jurisdiction in matters of local concern.

Since 1966 United has injected increasing amounts of natural gas into its Green System-East from facilities which also supply gas to United's interstate system serving markets beyond the State of Louisiana. According to the Commission, existence of natural gas in the Green System-East which has travelled part of its journey with other supplies of gas which will subsequently be trans-

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[4] The Fifth Circuit relied strongly upon a statement of Senator Bricker of Ohio in connection with enactment of Section 1(c) where the Senator seems to be saying that no pipeline company would be exempted from Commission jurisdiction. *See* App. 22a. But the Senator's statement is obviously read too broadly by the court, for such an interpretation would mean that the East Ohio Gas Company was not exempt under Section 1(c) when assertion of Commission jurisdiction over East Ohio was the immediate cause for enactment of Section 1(c). In reference to Senator Bricker's statement, it may be noted that exemption of the Green System-East does not remove United Gas Pipe Line Company from Commission jurisdiction.

ported out of state renders all transportation and all sales for resale in the Green System-East subject to its jurisdiction (App. 38a-39a, 50a). The Commission found that the scope of its regulation over United, which had been adequate for many years, including the period since 1966 when United made its first interconnections, suddenly must be expanded to include the Green System-East. It is this expansion of federal power into an area formerly occupied by the state which presents a direct confrontation of state vs. federal interest and requires this Court's in-depth analysis of the purpose of the Section 1(c) exemption.

1. The Fifth Circuit's Decision Expands the Scope of Federal Jurisdiction Contrary to Section 1(c) of the Act.

Section 1(c) was added as an amendment to the Act in 1954 after experience had shown that jurisdiction granted to the Commission by the 1938 Act was too broad.[5] As originally enacted in 1938, the Act was intended to give the Commission authority over those areas of interstate commerce which are beyond the power of the states.[6] Thus, sales in interstate commerce for resale[7] and transportation in interstate commerce[8] were

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[5] See, *e.g.*, "Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 83rd Cong., 1st Sess., on H.R. 2679 and H.R. 3707 Bills to amend the Natural Gas Act of 1938, as amended, and H.R. 3769, H.R. 3892, H.R. 5298, and H.R. 5976, Bills to amend Section 1 of the Natural Gas Act" (June 29, 1953, pp. 5, 8, 18, and 25). *See also*, 100 CONG. REC., Vol. 48, pp. 3042-4043, (daily ed. March 15, 1954). Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364, 368 (D.C. Cir. 1959).

[6] Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 504-05 (1942); Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana, 332 U.S. 507, 514-17 (1949).

[7] *Cf.*, Attleboro Steam & Electric Co. v. Pub. Util. Comm'n of Rhode Island, 273 U.S. 83 (1927).

[8] Pennsylvania Gas Co. v. Pub. Serv. Comm'n, 252 U.S. 23 (1920).

made subject to Commission jurisdiction under Section 1(b). All other sales, including direct sales to consumers and by local distributors, even when interstate commerce was involved, were exempt. *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Comm'n of Indiana*, 332 U.S. 507, 514-17 (1949).

Significantly, as this Court has noted in *Panhandle Eastern*, the "primary purpose [of the 1938 legislation] was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." [9]

However, experience proved that the jurisdictional grant of the 1938 Act was too broad. This Court held in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950), that East Ohio was subject to Commission jurisdiction where it transported and sold gas for consumption wholly within the State of Ohio. East Ohio purchased gas from an affiliate, Hope Natural Gas Company at the Ohio-West Virginia border and clearly acted as the "local branch" of an interstate pipeline system in transporting and selling the gas so received for consumption entirely within the State of Ohio.

Reaction to *East Ohio* found expression in Section 1(c) of the Act.[10] Just as Section 1(b) had recognized that

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[9] 332 U.S. at 517.

[10] Section 1(c), which is popularly called the Hinshaw Amendment, was sponsored by Representative Hinshaw of California. The pipeline companies in California which receive out-of-state supplies conduct their operations entirely within California, and all gas received by them is consumed in California. Those companies have been exempted from Commission jurisdiction by Section 1(c). Physically, their activities cannot be differentiated from those of East Ohio.

certain activities in interstate commerce are nonetheless local in nature—*e.g.*, local distribution and direct sales—Section 1(c) declared that transportation and sales for resale in interstate commerce are local in nature where all of the gas is to be consumed entirely within the state. Thus, in 1954, Congress provided that the Act [Sec. 1(c), 15 U.S.C. § 717(c)]:

> ". . . shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a state if all the gas so received is ultimately consumed within such state or to the facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a state commission."

Thus, the express design of Section 1(c) was to retrieve from the Commission power over certain transactions and facilities in interstate commerce which *East Ohio* had held to be subject to Commission jurisdiction under the 1938 Act. The line between federal and state jurisdiction subsequent to enactment of the Hinshaw Amendment is no less sharp and clear than it was when viewed by the Court in the *Panhandle Eastern* case. In fact, Section 1(c) more clearly defines the aspects of interstate commerce which are local in nature and, thus, subject to regulation of the several states.

But, in affirming the Commission's assertion of jurisdiction over the Green System-East, the Fifth Circuit fails to recognize the line between state and federal jurisdiction. Instead of applying the local nature test manifest by the fact that all gas received into the Green System-East is consumed in Louisiana, the lower court would effectively write Section 1(c) out of the Act and return to the jurisdictional test of *East Ohio*. The Fifth Cir-

cuit would now hold that even where all gas is consumed within the state all interstate transportation and sales for resale are jurisdictional; only distribution companies would be exempt (App. at 21a). Under the lower court's interpretation, the corporate identity, not the physical operations, provides the touchstone of jurisdiction.

But the purpose of Section 1(c) was not limited to exemption of distribution companies. Such companies and their activities are already exempt under Section 1(b). Operation of companies, such as East Ohio Gas Company in Ohio, Columbia Gas of West Virginia, Inc. in West Virginia,[11] and Michigan Consolidated Gas Co. in Michigan[12] are statewide in nature. Their pipeline systems are more extensive than the Green System-East. Yet, the Hinshaw Amendment assures that their operations are subject to state regulation, since their operations are local in nature. Thus, it can readily be seen that contrary to the Fifth Circuit, Section 1(c) does include "local branches" of interstate pipelines. Indeed, the very characterization of the Green System-East as a "local branch" carries with it the implicit recognition that its operations are local in nature.

2. The Fifth Circuit's Decision is Contrary to Long-Standing Interpretation of Section 1(c).

In the years since adoption of Section 1(c), the Commission has, until this proceeding, consistently recognized the limitation of its power. It has issued more than 180 orders declaring exemptions under Section 1(c). Some of these have involved instances where a pipeline has exempted that portion of its facilities operated entirely within one state where all gas is consumed in that state even though no separate, artificial, corporate entity has

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[11] Columbia Gas of West Virginia, Inc., 44 F.P.C. 1260 (1970).

[12] Michigan Consolidated Gas Co., 46 F.P.C. 658 (1971).

been set up to conduct the exempt operations.[13] In other instances, such as *Pennzoil Pipeline Co.*, 44 F.P.C. 291 (1970), the Commission declared a Texas portion of United's interstate system to be exempt under Section 1(c) where all the gas received into the Pennzoil Pipeline is consumed in Texas.

The Fifth Circuit's decision, if allowed to stand, would emasculate the Section 1(c) exemption. The effect of its decision would reach far beyond the confines of this proceeding and would require re-examination of numerous exempt operations throughout the nation. What Congress has declared to be local in nature would not, if the lower court were correct, be local depending upon the identity of the party supplying the interstate gas. Clearly, as this Court noted in the *Panhandle Eastern* case (332 U.S. at 519):

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of the wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption."

The Court's language is directly in point here, but there can be no doubt that the result of the Fifth Circuit's decision would be "to cut down regulatory power [of the states] and to do so in a manner making states less capable of regulation than before the statute's [Section 1(c)] adoption."

Section 1(c) does not require that a state's exercise of jurisdiction be precisely the same as that expressed in the Act in order for the exemption to apply. Proce-

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[13] *See, e.g.*, Utah Gas Service Co., 38 F.P.C. 1210 (1967), *reh. denied*, 39 F.P.C. 388 (1968); Mountain Gas Co., 42 F.P.C. 305 (1969).

dures for state regulation were left to the states. Moreover, it is clear that no regulatory gap is created where the state regulates the transportation and sales for resale which, in the absence of Section 1(c), would be subject to federal regulation.[14]

As a practical matter, it may be noted that the applicability of Commission policy in such matters as curtailment can be applied on a uniform basis by retaining the dichotomy between federal and state jurisdiction expressed in the Section 1(c) exemption. Thus, the Commission may continue to regulate United in a uniform manner assuring, through established procedures, that the Green System-East, like all other non-jurisdictional systems or purchasers bears its fair share of curtailment. Commission curtailment procedures are designed on an end-use basis so that customers on the exempted Green System-East can share equally any allocation of supply on United's system with other consumers who rely upon United for gas supplies.

Pursuant to the Commission's curtailment policy, customers of a pipeline are curtailed on the basis of the end-use to which the gas is put by the ultimate consumers. Thus, a distribution company receives its allocation based upon the cumulative priorities of its customers. Significantly, however, the Commission expressly recognizes that once it has made its allocation, the actual

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[14] No regulatory gap is involved in this case since both the transportation and the sales for resale on the Green System-East are subject to regulation by the State of Louisiana. *See* La. Const. Art. 6, § 4, and 45 La. Rev. Stat. §§ 301-03. The fact that direct sales are not regulated in Louisiana is, of course, irrelevant to construction of Section 1(c). Direct sales are exempt from Commission regulation under Section 1(b) regardless of the nature of state regulation. Section 1(c) cannot be read to impose a requirement, not contained in Section 1(b), that state regulation must be broadened to cover direct sales.

allotment to customers on the distribution system is a matter for determination by the state commission.[15]

In the same manner, the Commission's curtailment policy is applicable to Hinshaw companies exempt under Section 1(c), *e.g.*, Pacific Lighting Gas Supply Company (which receives gas from El Paso Natural Gas Company and Transwestern Pipeline Company) and Pennzoil Pipeline Company (which receives gas from United).

CONCLUSION

For the reasons stated, a writ of ceritorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted

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[15] Panhandle Eastern Pipe Line Co., Docket No. RP71-119, (September 28, 1973) and Panhandle Eastern Pipe Line Co. (Pioneer-Hi-Bred Corn Co.), Docket No. RP71-119, (November 21, 1973).

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-872

STATE OF LOUISIANA,
LOUISIANA MUNICIPAL ASSOCIATION
AND PARISH OF CAMERON,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION OF STATE OF LOUISIANA AND ALLIED INTERVENORS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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IN THE

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OCTOBER TERM, 1973

No.

STATE OF LOUISIANA,
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Respondent.

PETITION OF STATE OF LOUISIANA AND ALLIED INTERVENORS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF STATE OF LOUISIANA AND ALLIED INTERVENORS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of Louisiana, Louisiana Municipal Association and Parish of Cameron (Louisiana) prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 28, 1973.

OPINION BELOW

The opinion of the Cort of Appeals in *Louisiana Power & Light Co., et al. v. FPC*, Nos. 72-1714, *et al.*, decided June 28, 1973, is reported at 483 F.2d 623 (5th Cir.) *reh. den.* 483 F.2d 1404. The opinions and orders of the Federal Power Commission (FPC), styled *United Gas Pipe Line Co.*, Docket No. CP71-89, Opinion Nos. 610 and 610A, were issued February 9, 1972, and April 7, 1972, and are reported at 47 FPC 254 and 47 FPC 1021 respectively. The opinions of the Court of Appeals and the FPC are reported in the separate Joint Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1973. A timely petition for rehearing was denied on September 5, 1973, and this petition for writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act (Act), 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether FPC jurisdiction should be expanded, in derogation of Sections 1(b) and 2(7) of the Act, to encompass the purely local operations of a pipeline whose intrastate status has long been recognized and in which all gas flowing has been produced, transported, sold and consumed within only one state because there has been common and mutually beneficial use by intrastate and interstate pipelines of gathering and production facilities exempted from that agency's jurisdiction by Section 1(b) and where such "commingling" mitigates the adverse impact of the critical gas shortage now facing the nation?

2. Whether FPC jurisdiction of specific pipeline transmission facilities used to make sales of gas in interstate commerce or transport gas in such commerce should be expanded, in derogation of Section 7(c) of the Act, to encompass all interconnected facilities in an intrastate pipeline system which sells or transports gas to local consumers within the state where the gas is produced despite the fact that such broader federal jurisdiction will compel both intrastate and interstate pipelines to build costly, environmentally damaging and unnecessary duplicate facilities and destroy operating flexibility vitally needed to mitigate the adverse impact of the critical gas shortage now facing the nation?

3. Whether the FPC may usurp a state's jurisdiction over an intrastate pipeline where its owner has violated Section 7(c) of the Act by interconnecting interstate and intrastate pipeline facilities without prior agency authorization and whether the motives for such illegal acts are irrelevant to a determination of jurisdiction despite the fact that this principle will permit every intrastate pipeline in the nation to nullify its contracts with local customers and suppliers in order to promote its own selfish financial interests?

4. Whether FPC jurisdiction should be expanded, in derogation of § 1(c) of the Act and in a manner which discourages common use of pipeline facilities and gas supply for the purpose of alleviating the national energy shortage, to include pipeline facilities otherwise eligible for exemption from the provisions of the Act under § 1 (c) thereof because such facilities are owned by a person which also owns interstate facilities and:

a) Gas is injected into such local facilities after being transportated in FPC certificated interstate facilities owned by the same person, or

b) Gas is exchanged between such local facilities and the interstate facilities of other pipelines?

STATUTES INVOLVED

The statutory provisions involved are Sections 1(b), 1(c) and 7(c) of the Act as amended, 15 U.S.C. and § 717(b), 717(c) and 717f(c). These provisions are reprinted in the Joint Appendix hereto.

STATEMENT

United Gas Pipeline Company is a major interstate pipeline, subject to FPC regulation, which operates an integrated network of pipeline facilities extending across several states. For several decades, it has also operated a wholly separate network of interstate pipeline facilities in Southern Louisiana which were subject only to regulation by the Louisiana Public Service Commission (LPSC). This review proceeding will determine whether the self-serving and illegal acts of United have ousted the LPSC of the exclusive regulatory jurisdiction it has always exercised over the resale rates and services rendered by these intrastate facilities. The transfer of jurisdiction ordered by the FPC and sustained by the Court of Appeals will have drastic and far-reaching consequences.

As the Court below found, FPC jurisdiction will permit United to abrogate and nullify its fixed price, low price contracts with its direct industrial customers[1] so that the gas which otherwise would be delivered to such customers ". . . can be sold and indeed will be sold for substantially higher prices on today's market than a pipeline could realize under the old long-term contracts entered years ago."[2] This explains United's zeal to evade State regulation.

[1] Industries and power plants purchasing gas for their own consumption. Neither the FPC nor the LPSC has statutory power to prescribe rates for such direct sales.

[2] 483 F2d at 626.

United operates three separate and distinct networks of local intrastate pipeline facilities in Southern Louisiana. Its Lafayette district facilities comprise the "Purple System" and its New Orleans district facilities comprise the "Green System-East" and "Green System-West." The Green and Purple facilities networks are not interconnected at any point, and all parties concede that their jurisdictional status must be separately determined. The East and West facilities networks are joined together at a single point and there is a dispute as to whether their jurisdictional status must be separately determined.

Until 1965, when United unlawfully interconnected its Green System-East and interstate system without having first obtained the prior authorization required by §7(c) of the Act, all gas supplies needed to meet the requirements of its customers were furnished by producers from reserves in the area of such system. Many of these producer contracts restricted the use of the gas to intrastate commerce. The unlawfully injected gas was sold to United by producers under FPC certificates of public convenience and necessity they were required to obtain because while some of that gas was sold in the state of origin the major portion was transported to other states. But, all gas flowing in the Green System-East is produced and consumed entirely within the State of Louisiana.[3] The Green System-East operates at a lower pressure than United's interstate systsm and this

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[3] The Court below *expressly found:* ". . . that all the gas which goes into the Green System-East is produced in Louisiana gas fields . . ." 484 F2d at 625. Furthermore the FPC based its jurisdiction entirely upon commingling and neither found that offshore gas from the Federal Domain entered the East facilities not indicated that, if such were the case, it would treat such gas flows as statutory interstate commerce. The FPC conceded these facts during oral argument. (pp. 113-14). The Court also expressly found that the gas entering the Green System ". . . never flows out of the state." 483 F.2d at 628.

makes it impossible for such local facilities to deliver gas into United's interstate transmission lines located in Louisiana. Thus, the illegal "commingling" which is the sole basis for the FPC's and the Court of Appeals' finding of jurisdiction does not involve any movement of gas between states and relates only to the common use of interstate facilities to move state produced gas destined for local use and gas destined for use in other states.

In fact, the commingled stream of gas occurs only at two points on the Green System-East, Points "I" and "J". As the court below found, this commingling occurs only at the tailgate of extraction plants (used to remove valuable liquid hydrocarbons from the gas) which are facilities used for the production or gathering of natural gas and, as such, are specifically exempted from all provisions of the Act under § 1(b). Thus, the Court stated (483 F.2d at 630);

> "Both Points 'J' and 'I' present similar factual situations since they both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading to United's interstate system, the other into the Green System-East."

At Point "I" gas received from the plant travels through 93 feet of Y-shaped FPC certificated lines and United makes no claim that it could not have arranged to receive separate deliveries through two different pieces of pipe. At Point "J" the interconnection was first used in 1968, and delivery ceased on November 3, 1970, the last calendar year to which the evidence in the proceeding related. Louisiana maintains that the jurisdictional status of the East facilities must be determined on this set of facts.

However, the FPC and the Court of Appeals believe that the East and West facilities must be treated as a single entity for jurisdictional purposes and on this basis found operational integration between the entire Green system

and United's interstate system. There are unauthorized interconnections involving substantial gas volumes between the West and the interstate systems at points "L" and "M". However, United has undisputed plenary control over the dispatching and routing of gas supplies along, and between, its intrastate and interstate facilities. And, substantially more gas flows from the East to the West system then is injected into the East system from the interstate system. Louisiana argued to both the FPC and to the Court of Appeals that these flows are completely lacking in significance since United deliberately arranged its operations to evade State jurisdiction. But, they held that FPC jurisdiction depends solely on physical gas flows and that the motive underlying such flows was irrelevant and immaterial.

There are no points of interconnection between United's Purple System and its own interstate systems. However, there are eight points at which the FPC has certificated exchange agreements between various other interstate pipelines and these United intrastate facilities. The FPC and the Court of Appeals believe that an exchange between an interstate and intrastate pipeline subjects all of the latter's facilities to federal jurisdiction. Louisiana maintains that such common and mutually beneficial use of facilities does not preclude a Section 1(c), or "Hinshaw Amendment," exemption.

The FPC based its decision on officially noticed facts concerning United's peak day flows. Louisiana requested the opportunity to deny and rebut such facts but the FPC denied this request without comment and the Court of Appeals also did not mention this contention. The agency relied on such extra-record data to find the operational integration which is the very heart of its and the Court's finding of jurisdiction. Furthermore, the facts officially

noticed are not the type whose significance is self-evident. Commissioner Carver characterized this in the gravest terms, stating:[4]

> Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal.

The FPC held that § 1(c) of the Act exempting interstate operations where all gas received within a state is ultimately consumed within its borders is inapplicable to the Green System-East although this statutory requirement was met on the ground that such facilities were an integrated part of United's interstate system. The Court of Appeals affirmed this holding on the grounds that the exemption was limited to local distributors and did not encompass local facilities owned by an interstate pipeline. Neither the FPC nor the Court addressed itself to Louisiana's claim that the Purple System should be Hinshawed.

REASONS FOR GRANTING THE WRIT

This petition raises issues of first impression and nation-wide scope which are of exceptional importance to the solution of the problems posed by the critical shortage of all forms of fossil fuels in the United States. The decision of the Court of Appeals sustains an FPC effort to expand federal jurisdiction into the area of intrastate commerce in natural gas which, unless reversed, will impose an immense and destructive financial and operational burden upon the owners and operators of all but a few intrastate pipelines in the nation and prevent a long-established and mutually

[4] App. at 76.

beneficial common use of pipeline facilities and gas supplies essential to mitigate the impact of gas and fuel oil shortages.

1. The Act manifests a Congressional intent to reserve to the states all of the powers that they enjoyed before its passage to regulate intrastate commerce in natural gas. No section of the Act empowers the FPC to regulate any aspect of such commerce. *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1, 17. *For the first time in its history, the FPC is departing from the explicit and long established statutory standard that its jurisdiction depends upon the physical flow of gas across state lines in specific pipeline facilities used to make an interstate sale or move gas in interstate transportation and extends only to such sales and transportation.*

The Act does not prohibit a natural gas company from engaging in both interstate and intrastate commerce. Thus, an FPC certificated pipeline can also operate intrastate pipelines. United has done so with the knowledge and consent of the FPC for many years. By the same token, an FPC certificated interstate independent producer can also sell gas to intrastate pipelines. Just as a state cannot prevent a pipeline engaged in both interstate and intrastate activities from making an interstate sale, the FPC cannot prevent it from making an intrastate sale.

Furthermore, the FPC has no jurisdiction over the physical activities, facilities and properties used in production or gathering by virtue of the exemption of ". . . the production or gathering of natural gas" from FPC jurisdiction contained in Section 1(b) of the Act. *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 402; *Deep South Oil Co. of Texas v. FPC*, 247 F. 2d 882 (3rd Cir. 1957). Where there is an interstate sale or interstate transportation, the jurisdiction of the FPC applies to such

facilities, but only to the extent necessary to authorize it to regulate such sale or transportation. *Saturn Oil and Gas Co.* v *FPC*, 250 F.2d 61, 68 (10th Cir. 1957) *cert. den.*, 355 U.S. 956 (1958). In the context of these express statutory limitations upon the jurisdiction of the FPC, and their consistent interpretation by the agency and the courts, independent producers, gatherers and extraction plants have always used common facilities to make both intrastate and interstate sales. This has never been deemed to result in FPC jurisdiction over the purely local facilities used to sell gas received from such common sources. Intrastate pipelines have also long engaged in widespread exchanges with interstate lines absent FPC certificate authorization, and this practice has never been deemed to subject them to federal regulation.

The decision of the Court below adopts the FPC's novel "commingling" theory that such common use of wells, gathering lines or extraction plants, at a single delivery point where the gas is received by an intrastate pipeline, transforms that line and all other local intrastate lines connected thereto to interstate pipelines subject to plenary and exclusive FPC jurisdiction. Under this theory, it is immaterial and irrelevant that all of the gas carried in United's Green System-East is produced within Louisiana and that none of it ever leaves the state. The rationale for this sweeping usurpation of state jurisdiction over pipeline facilities used only to make local deliveries of state-produced gas is that there is a "commingling" of Louisiana-produced gas destined for use in other states with Louisiana-produced gas destined for use in the state of origin. It is the mere mechanical and meaningless element of commingling *per se* which results in FPC jurisdiction, absent any showing that interstate commerce is involved. Thus, the decision of the Court below expands the jurisdiction of the FPC to include each and every intrastate

pipeline in the nation unless it is completely and hermetically sealed from contamination by any gas produced within the same state which has at any point in its journey from wellhead to ultimate consumer moved in facilities also used to carry other state-produced gas which eventually cross a state line.

In theory, intrastate pipelines could construct and operate completely self-contained and separate facilities reaching from the wellhead to the points where they serve ultimate consumers. In practice, such a course would force them to reorganize their pattern of operation at the very time when the United States has a national energy shortage of emergency proportions[5] and a greater need than ever before for cooperative arrangements between all segments of the natural gas industry. The cost of unnecessarily duplicating facilities is prohibitive both in terms of damage to the environment by the building of additional gathering and transmissons lines[6] and in terms of waste of already scarce economic and material resources.

Worse still, operating flexibility vitally needed to meet emergency shortages of gas by shifting supplies between localities and companies will be destroyed. The FPC itself has properly recognized the need to permit Hinshawed interstate natural gas companies exempt from the Act under § 1(c) and distribution companies and intrastate pipeline companies exempt from the Act under § 1(b) to aid interstate distribution companies and pipelines in need of temporary emergency gas supplies, without jeopardizing

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[5] Evidenced by the enactment of the Emergency Petroleum Act of 1973 and the passage by the Senate of S.2589, the National Energy Emergency Act of 1973 now before the House Interstate Commerce Committee.

[6] Section 2.82 of the FPC Regulations under the Natural Gas Act require detailed compliance with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-47, in certificate cases.

their nonjurisdictional status. § 2.68 of the Statements of General Policy, 18 C.F.R. 60 (Vol. I). The FPC has also permitted emergency purchases of gas to be made by interstate pipelines from intrastate producers without subjecting the latter to a loss of their nonjurisdictional status. § 157.29 of the Regulations under the Natural Gas Act, 18 C.F.R. 73 (Vol. II). Louisiana petitioned for an amendment of these agency rules to permit interstate pipelines to deliver gas to meet the emergency needs of an intrastate pipeline without subjecting the latter to federal regulation on December 21, 1972, but no action has been taken. Instead, the FPC ignores considerations of comity, fairness and mutuality and insists that intrastate pipelines must cope with emergencies affecting the health and physical safety of thousands of their customers without the benefit of such help as interstate pipelines may be able to give without even inconveniencing any of their own customers. Indeed, the "peak day" flows on the basis of which the FPC and the Court of Appeals have found federal jurisdiction to exist occurred during precisely such periods when there was a temporary emergency shortage of gas. Clearly, the national interest in mitigating the impact of chronic gas shortages will be equally disserved by preventing either exchanges between intrastate and interstate pipelines or any and all use of certificated interstate pipeline facilities to transport intrastate gas.

2. The decision that an intrastate pipeline may arrogate to itself the decision of whether it is to be regulated by local or federal authorities and can unilaterally abrogate its contractual obligations to direct sale customers and to producer suppliers by unlawfully interconnecting its facilities to those of an FPC certificated pipeline at a single delivery point has an equally sweeping and nationwide impact. Exploraton and development efforts to find new gas supplies, and enlarge existing supplies, are undertaken in

the distinct and separate financial and regulatory framework of state or federal control. Neither independent producers nor regulatory bodies can plan rationally in the chaotic climate of uncertainty introduced by the Court of Appeals' affirmance of the FPC's novel doctrine that jurisdiction depends entirely upon physical gas flows induced by a deliberate effort to evade state regulation by selfish gas companies seeking to profit from the nationwide shortage.

This FPC holding finds no support in its prior precedents and is at war with its decision in *Willmut Gas and Oil Co., et al. v. United Gas Pipe Line Co.*, 12 FPC 132, 137-138, 140-141. There, United deliberately rearranged its operations to evade federal jurisdiction and the FPC majority held that a regulated utility could not arrogate to itself the right to determine its jurisdictional status. The dissenting opinion of Commissioner Draper that motives were immaterial where jurisdictional gas flows stem from a violation of the Act was flatly rejected.

3. Until this case, the FPC has never held that the mere commingling in a single pipeline of state-produced gas, destined for local use and for use in other states, before injection into a wholly separate intrastate pipeline having its own gas supply created federal jurisdiction. On the contrary, it has consistently held that mere commingling does not subject an otherwise intrastate pipeline to federal jurisdiction. Thus, commingling of gas destined for interstate and intrastate use, in a common storage field owned by an interstate pipeline company did not cause FPC jurisdiction to attach to an intrastate pipeline. *Natural Gas Pipeline Co. of America*, 34 FPC 1258. Again, the commingling in a single tank of imported liquefied natural gas subsequently sold, in part, in intrastate commerce within the state of importation and sold, in part, in interstate com-

merce outside that state did not create FPC jurisdiction over the local sales. *Distrigas Corp.*, 47 FPC 752, 755–757, affirming the Initial Decision of Presiding Judge Litt. These two factual situations are a *complete* and *exact* parallel to the commingling at Points "I" and "J" which, in the words of the Court below, "both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading into United's interstate system, the other into the Green System-East" (483 F.2d at 630). Finally, the FPC and the Court of Appeals for the Third Circuit have expressly rejected the view that the mere commingling of gas being transported for an independent producer by an interstate pipeline with gas owned and resold by that pipeline converted the transportation agreement into a sale by the producer to the pipeline and a second sale by the pipeline to the producer. *Public Service Electric and Gas Co.* v. *FPC*, 371 F.2d 1, 4 (3rd Cir. 1967). Plainly then, the decision is in conflict with the FPC's own decisions and with that of the Third Circuit.

4. The FPC bases its commingling theory on a misinterpretation of *People of the State of California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 *("Lo-Vaca"); FPC* v. *Amerada Petroleum Corp.*, 379 U.S. 687, reh. den., 380 U.S. 959, 989, *("Amerada");* and *Louisiana Public Service Commission* v. *FPC*, 359 F.2d 525 (5th Cir. 1966) *("Florida Parishes").* All of these cases prescribe the nature of the channel of constant flow, which is basically interstate or intrastate, as the line of demarcation between federal and state jurisdiction. In the Green System-East, this channel is entirely within the State of Louisiana whereas in these other cases it was in an interstate pipeline crossing several state borders but also used to make local sales within Louisiana. *Lo-Vaca* and *Amerada* are also distinguishable because there the parties were attempting to mask a movement of gas in interstate commerce with an intrastate character by con-

tract language designed to evade federal jurisdiction. As this Court noted, if FPC jurisdiction over gas volumes transported within a single interstate pipeline could be defeated by prior contractual arrangements allocating particular volumes to direct industrial uses, the pipeline could discriminate in favor of its nonjurisdictional customers and immunize particular producers from federal regulation to the detriment of consumers at the opposite end of the same pipeline. *Lo-Vaca, supra,* at 369–370. No such danger exists here since all customers of the Green System-East are located in a single producing state, Louisiana.

In *Public Service Electric and Gas, id* at 5, the Third Circuit distinguished *Lo-Vaca* and *Amerada* on the ground that they involved the element of contrived contractual arrangements designed to undermine federal jurisdiction which is missing here. The commingling doctrine was developed to prevent attempts to *evade* federal jurisdiction. Its application here will unlawfully *expand* federal jurisdiction.

5. The Court of Appeals found *Lo-Vaca, Amerada* and *Florida Parishes* controlling upon the basis of its completely inexplicable and clearly mistaken belief that petitioners conceded the applicability of these precedents and sought to distinguish them merely on the ground that the flow of gas from the interstate to the intrastate system was intermittent and minimal. 483 F.2d at 631. But, Louisiana and all other petitioners vigorously distinguished these cases on the ground that their rationale was the test of whether the channel of constant flow was interstate or intrastate. This test is based on engineering realities since the flow in the East system, unlike the flow of electricity, can be physically traced. Cf. *Florida Power and Light Co.* v. *FPC,* 430 F.2d 1377 (5th Cir. 1970), *reversed,* 404 U.S. 453.

6. The FPC based its jurisdiction upon gas flows within

the East and West portions of United's Green System facilities, considered as a single unit. Its rationale for this crucially important determination was that such unitary consideration was justified only ". . . because the New Orleans District is situated in the eastern part of Sourthern Louisiana and includes Baton Rouge and Napoleonsville." But, the mere fact that United's wholly separate interstate and intrastate pipelines are in the same geographic area does not demonstrate operational integration.

In any event, Section 7(c) of the Act[7] expressly requires the certification of physical *facilities* and does not permit the FPC to use *pipeline operating districts as the minimum size unit for jurisdictional and Hinshaw exemption purposes.* But, the court erroneously construes the Act to require the certification of pipeline *systems* rather than *facilities.* It is on this basis that it attaches controlling significance to the irrelevant and immaterial fact that a single piece of pipe carries gas from the Green System-East to the Green System-West.[8] 483 F.2d at 629–30. This is clearly incorrect. For, as the FPC itself said in *Medina Gathering Corp., et al.,* 30 FPC 227, 233: "When we turn to the question of the Commission's jurisdiction over Medina's facilities, *the answers depend not on the economic function of the company as a whole but rather on the nature of the specific facilities considered item by item*" [emphasis added]. *The FPC applied this very principle to United in certificating a portion of the Green System-West facilities without perceiving any necessity to*

[7] 15 U.S.C. 717 f(c)

[8] In departing from the FPC's rationale, and advancing a wholly different rationale entirely of its own construction, the Court of Appeals acted improperly. For, a reviewing court must judge an agency order embodying a determination of policy which the agency alone is authorized to make solely on the basis of the ground relied upon in the opinion. *Securities and Exchange Com. v. Chenery Corp.,* 318 U.S. 80, 88; *Securities and Exchange Commission v. Chenery,* 332 U.S. 194, 196.

certificate either the rest of those facilities or the entire complex of Green System facilities.

The Court sanctions and upholds the FPC's unprecedented departure from its consistent practice of measuring its jurisdiction over the interstate sale and transportation of natural gas in terms of the precise physical facilities used to make a specific sale or to carry out a particular transportation agreement. This means that if Louisiana-produced gas is delivered, by use of an FPC certificated transmission line, to any single point on one line in an interconnected set of lines used only to sell or transport such gas to local Louisiana consumers, all such intrastate pipeline facilities are subject to FPC jurisdiction. Here again, this expanded jurisdictional standard requires complete isolation of each and every facility of an intrastate pipeline from interconnections or exchanges with gas produced in the state of consumption which is commingled at any point in its journey from the wellhead to the ultimate consumer in pipeline facilities of *de minimis* length which have been certificated by the FPC. The plain language of Section 7(c), and its consistent and contemporaneous administrative interpretation by the agency, do not permit this drastic and far reaching judicial revision of the statute.

7. The Court of Appeals, in its statement of the impact of an assumption of jurisdiction by the FPC upon United's customers,[9] expressed the belief that there could be no curtailment of such direct customers under the terms of their contracts. The FPC based its denial of the Hinshaw exemption on its finding of a regulatory gap in regulation because the LPSC does not have the same broad powers over direct sales as it claims to possess. (App. at 46) But, United's direct sale contracts all contain an Impairment of

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[9] 482 F2d at 626.

Deliveries Provision[10] which, like the FPC's own service priorities, base curtailments upon the nature of "end-use" of the gas and give the highest priority to residential and commercial usage. The FPC has never made any findings, after notice, opportunity for hearing and on the basis or record evidence, that such contractual service priorities are not in the public interest.[11]

8. Nor is there any danger that continuation of the intrastate status of United's Southern Louisiana's local pipelines will endanger gas supplies dedicated to the interstate market. The FPC has undisputed authority to control and regulate the use of any certificated interstate pipeline transmission facilities to deliver gas to an intrastate pipeline. This is equally true of an intrastate line not subject to FPC jurisdiction and of an interstate line which has been granted a Hinshaw exemption. This does not mean, as the FPC and United profess to believe, that the only option is to either cut off these supplies completely

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[10] For utility customers, this section reads as follows:

"IMPAIRMENT OF DELIVERIES

Buyer specifically recognizes the fact that Seller delivers gas to utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."[In the industrial contracts there appear the words "including buyer" at the end of the paragraph.] Exh. 59. *United Gas Pipe Line Company*, Docket No. RP71-29, *et al.*

[11] Louisiana has challenged the constitutionality and lawfulness of the FPC's action overturning such contractual priorities in the curtailment proceeding presently under review by the Court of Appeals for the Fifth Circuit, *State of Louisiana et al. v. FPC*, No. 73-3478.

and cause a disastrous human and economic emergency for the State of Louisiana or to certificate the intrastate pipeline systems. For, the FPC can certificate the *limited facilities and gas supplies* needed to make deliveries from United's interstate system into its Southern Louisiana intrastate systems. This is the conventional procedure when an interstate pipeline institutes service to a state-regulated distributor or pipeline exempt under Section 1(c) of the Act.

9. The FPC and the Court found § 1(c) inapplicable to the Green System-East because it was interconnected to United's own interstate pipeline system. ***But, on August 14, 1970 the FPC permitted United to convert a portion of its integrated interstate pipeline system in Texas to a separate corporation owned by United's parent company which it then exempted under § 1(c).*** This action was taken less than five weeks before the FPC directed United, on September 17, 1970, to apply for certificates covering its Southern Louisiana intrastate operations and facilities. The timing of this agency directive is significant since it was purportedly an effort to comply with the holding of the *Florida Parishes* case which became final, four years earlier, upon the denial of certiorari in 1966!

The FPC has also granted Hinshaw exemptions to other local pipelines which were part of the integrated operations of interstate pipeline companies *(Columbia Gas of West Virginia, Inc.* Docket No. CP70-179, order issued October 20, 1970, and *Michigan Consolidated Gas Co., et al.,* Docket No. CP71-305, order issued September 10, 1971). A contrary reading of § 1(c) defeats the clear and unmistakable purpose of that amendment, since the East Ohio Gas Company, whose jurisdictional status motivated this change in the Act, was a pipeline operating high pressure lines for several hundred miles within the State of Ohio and was affiliated, as well as physically in-

terconnected, with the interstate pipeline system. *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).

10. The FPC and the Court also found § 1(c) inapplicable to the Green System-East because the "certificated gas was not received from 'another person.' " But, the Court itself expressly found in its own statement of the facts that the only such gas received by the Green System-East was at Points "I" and "J".[12] These are the tailgates of extraction plants so that the gas was received from "another person," *i.e.* the independent producer owning the plant. *Thus, the crucial holding that United received gas from itself at the point of connection between the Green System-East and its interstate system is rooted in a purely hypothetical and nonexistent set of facts.* Plainly then, the denial of a Hinshaw exemption to these facilities can only be justified by splitting the single 93-foot Y-shaped peice of pipe connecting the tailgate of each extraction plant to United's intrastate and interstate lines, respectively, into three metaphysically separate components. Only by this farfetched and illogical exercise can United be viewed as making a constructive delivery to itself at the point of receipt of the gas where the Court erroneously found that the exemption must take effect.

Finally, § 1(c) merely requires that the interstate gas be ". . . received by such person from another person within or at the boundary of a State . . . ." This means that the point of receipt for a local branch of an integrated interstate pipeline system can be anywhere in the state where the ". . . gas so received is ultimately consumed. . ." and there is simply no basis for the Court's implication of the requirement that the receipt from another person must be at the point of connection between the certificated and uncertificated transmission facilities.

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[12] 483 F.2d at 630.

11. Neither the FPC nor the Court made any findings addressed to Louisiana's contention that the Purple System should be Hinshawed. [13] This is reversible error and a clear violation of § 556(c)(a) and (3) of the Administrative Procedure Act, 5 U.S.C. §556(c)(a), (3).

But, in its brief to the Court, [14] the FPC attempted to answer this argument by a recital of the fact that there are eight separate points on the Purple System at which gas is exchanged with interstate pipelines under FPC certificates and that such "commingling of interstate and intrastate gas does not constitute the consumption of gas entirely within one state which is required to obtain an exemption. . . ." Section 1(c) provides, in pertinent part:

> The provisions of this Act shall not apply to any person engaged or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce or the sale in interstate commerce for resale, of natural gas *received by such person within or at the boundary of a State* if all the natural gas so received is ultimately consumed within such State. . . . [Emphasis added.]

Since all of the gas received within Louisiana by United's Green System-East, Green System-West and Purple System is consumed within that state, this statutory requirement is plainly satisfied. The FPC is seeking by a process of strained interpretation to amend Section 1(c) to impose the additional requirement that no natural gas be *delivered* by the exempted intrastate pipeline to any interstate pipeline

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[13] Except for that unconnected and completely separate stubline flowing from Cameron, Louisiana to the Texas State line which should be certificated.

[14] At pp. 52-53.

whether it is in the same, or a different, state than the intrastate line.

Furthermore, the FPC's action in certificating these exchanges while preserving the nonjurisdictional intrastate status of the Purple System itself establishes that its latest interpretation of the Act is a sweeping departure from its prior consistent administrative interpretation and practice. The FPC and United are unable to cite a single precedent supporting their present position. Finally, this departure from the spirit and text of §1(c), which has always been broadly construed in the past and is now being subjected to an extremely restrictive and technical construction, is contrary to the public interest. This is especially true during this period of chronic and longlasting shortages of all fossil fuels which is of crisis dimensions. The refusal to permit exchanges between intrastate and interstate pipelines will compel nonjurisdictional local customers short of gas to join the nationwide scramble for even scarcer fuel oil and overtax beyond its capacity the already heavily burdened fuel oil distribution system in the United States by compelling the creation of new and unnecessary regional distribution systems.

For more than 40 years, Louisiana has relied entirely on natural gas and does not even have a network of fuel oil dealers. Its economy, like those of other gas producing states, is abnormally dependent upon consumption of this fuel. In this time of critical nationwide shortage of all forms of fossil fuel, cooperation between the intrastate and interstate gas markets is essential to increase the total amount of BTU's available to the entire United States. For a variety of reasons, significant volumes of gas reserves are suitable only for development by the intrastate market, and the decision below which cuts off access to idle interstate transmission pipeline capacity precludes the development of such new reserves.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

State of Louisiana, Louisiana Municipal Association and Parish of Cameron

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Dated at Washington, D.C.,
this 4th day of December, 1973.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-872

STATE OF LOUISIANA, LOUISIANA MUNICIPAL ASSOCIATION AND LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No.

EXXON CORPORATION AND TEXACO INC.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

JOINT APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI FILED ON BEHALF OF STATE OF LOUISIANA, LOUISIANA MUNICIPAL ASSOCIATION AND LOUISIANA PUBLIC SERVICE COMMISSION, AND EXXON CORPORATION AND TEXACO INC.

December 4, 1973

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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NATURAL GAS ACT

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by

the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 1954); 15 U.S.C. § 717(c)]

SECTION 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall

be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC.,
and CITIES SERVICE OIL COMPANY, ET AL.,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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(June 28, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges

MORGAN, Circuit Judge: This case is another in the long-running and seemingly endless saga of "Who Gets The Gas?", starring the major oil companies, the natural gas pipelines, major industrial users of natural gas, and the Federal Power Commission. Also featured, albeit in somewhat of a bit part, is the individual gas consumer, "the little lady at the burner tip". Although possibly suited for short subject treatment, this proceeding has now become a full-length feature of epic proportions. Basically it is this court's task to consider petitions for

review of FPC Opinions 610 and 610-A, in which the Commission took jurisdiction over a formerly intrastate pipeline in Eastern Louisiana. There are many parties with numerous underlying themes to present. From this confusion we must review whether or not the FPC correctly handed out the awards.

In Opinion 610, the FPC found that due to the injection of interstate gas, the formerly intrastate pipeline known as the "Green System-East" was now subject to FPC jurisdiction. Despite all the many different methods used by the petitioners in stating the issues, there are basically only two points for us to consider in reviewing the Commission: (1) Was the FPC correct in holding that the Green System-East had become sufficiently interstate to confer exclusive federal jurisdiction? (2) Even if the system would be otherwise an interstate pipeline subject to jurisdiction, had Congress expressly withdrawn federal jurisdiction for a pipeline such as this by enactment of the Hinshaw Amendment to the Natural Gas Act?

Also, in Opinion 610, the FPC found federal jurisdiction over United's Purple System, another formerly intrastate pipeline. While the majority of the petitioners challenge only the existence of federal jurisdiction over the Green System, two petitioners, Cities Service and Gulf States Utilities, challenge the characterization of the Purple System as interstate. The nature of each of these pipelines will be considered separately below.

The Green System-East

The Green System-East, a natural gas pipeline owned by United Gas Pipe Line Company, is physically situated entirely within the State of Louisiana in United's New Orleans division. For several years prior to October 1, 1970, when United filed an application for FPC certification for the Green System-East, these facilities had

been operated as an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. At this point it is necessary to note that the Green System-East is connected through systems of valves with other pipelines, including United's Black System which is an interstate pipeline. It appears that all the gas which goes into the Green System-East is produced in Louisiana gas fields, although at some point some of this gas may be carried in pipelines which also carry gas dedicated to the interstate market. There exists a heated debate as to whether any gas once placed in the Green System-East can or does ever leave the State of Louisiana. These factual matters are basic to the holding of jurisdiction and will be considered in detail *infra*.

Prior Proceedings

The Green System-East has been involved in a significant chain of court opinions. Petitioner, Louisiana Power & Light, previously brought suit in the United States District Court for the Western District of Louisiana seeking a determination of the intrastate character of the Green System-East. The district court, 332 F.Supp. 692 (1971), dismissed the suit, holding that the issue of the nature of the Green System-East was within the primary jurisdiction of the FPC.

On appeal, we reversed the district court, disagreeing that it was necessary to await Commission action. *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326. This court went on to address the issue of the Green System-East's interstate character and held that any interstate gas which had been introduced into the system was so minimal in amount that federal jurisdiction had not attached.

In *Federal Power Commission* v. *Louisiana Power & Light Co.*, —— U.S. ——, 32 L.Ed.2d 369 (1972), the Supreme Court reversed this court and agreed with the

result reached by the district court. Noting that the FPC was conducting hearings of its own in this regard, the Court held that while the agency's decision would not be the last word, it must be the first. The FPC has now reached its decision, finding that the Green System-East is sufficiently interstate to be jurisdictional. It is that "first word" of the agency which we now must review and issue, if not the last word, at least the "next word".

I.

Before proceeding to the merits of the controversy, it is helpful to have a firm picture of the various parties engaged in this litigation and their respective interests in its outcome. It is also important to understand the practical effect of FPC jurisdiction on the parties.

The petitioners can be divided into basic groups. The major oil companies have an interest in the outcome both as sellers and purchasers of natural gas. Several smaller distribution companies which purchase gas from United and the Green System are also challenging the Commission decision. Of course, the petitioners include several state regulatory agencies charged with the duty of regulating pipelines which are intrastate in nature. Public utilities which purchase natural gas for resale are involved as parties, as are various towns, parishes and municipalities, both as gas purchasers and representing the public interest. Basically, the effect of federal jurisdiction over the Green System-East will have a similar effect on each of these parties, although not to the same degree.

The petitioners, quite naturally, paint themselves as the heroes of this piece, denominating United as the villain and the FPC as conspiratorial bedfellow or, at the least, stooge of United. In giving depth to this characterization of United, the petitioners seek to show United as a greedy, over-reaching and somewhat callous corpo-

rate giant out to gorge itself at everyone's expense. The accuracy of this picture, they say, is made crystal clear by the results which will flow from FPC jurisdiction in this case.

These horrors which petitioners feel will flow from FPC jurisdiction are basically twofold. First, the switch from Louisiana Public Service Commission regulation, which, with regard to direct sales is virtually non-regulation, to FPC regulation will permit United to abrogate numerous long-term contracts which it has entered in the past for deliveries of gas to gas purchasers. The importance of this benefit can be seen immediately. Many of these contracts have several years yet to run. They were negotiated in the days when the supplies of natural gas appeared to be endless and, thus, contracts for extremely long terms, such as 20 years, were considered good business, sewing up a customer for the future. Of course, as we all know, with the rise of environmentalism which stressed the importance of natural gas as an essentially "clean" fuel and the realization that natural gas reserves and availability have been drastically overestimated, this country has been plunged into an "energy crisis". This "crisis" seems especially acute in the natural gas industry, possibly because of the greater demands for the fuel. Thus, what gas is available can be sold and indeed will be sold for substantially higher prices on today's market than a pipeline could realize under the old long-term contracts entered years ago. Even regulated prices would be substantially higher than the old contract rates, and it must be remembered that the FPC does not regulate the price of sales to direct customers such as large industries but only sales where ultimately the gas will be resold.

Secondly, the gas shortage has led to the necessary allocation of priorities and rationing of this limited supply of natural gas. Through what is popularly called

"curtailment", pipelines are allowed to file, subject to Commission approval, plans of allocation of the available gas, basically to ensure that gas goes not to the highest bidder but to those who need it most in the public interest. FPC jurisdiction, thus, also brings in the almost certain result of curtailment of deliveries, even contractually agreed to deliveries. See *International Paper Co.* v. *Federal Power Commission*, 5 Cir. 1973, —— F.2d —— [No. 71-3531, slip opinion dated February 7, 1973].

The parties who sell gas to United for the Green System-East are also worried that if the Green System-East is held interstate they will be in a difficult contractual situation because the gas they are using to fill United's needs is restricted in many cases to the intrastate market only by contracts with those having the gas rights. Thus, they fear that they will have to use other gas to service the Green System-East.

Viewing this situation, the petitioners present United as out after the "fast buck". They allege that United was perfectly willing to be regulated, or in some cases not regulated, by the Louisiana Public Service Commission until it became evident to United that it was to its distinct financial advantage to come under FPC jurisdiction. They further suggest that to obtain Commission jurisdiction, United improperly and perhaps illegally injected interstate gas into the Green System-East, as it could do because of the interconnecting valves, solely for the purpose of creating an argument for jurisdiction to present to the Commission.

United, for its part, seeks to reverse these roles and cast itself as the "good guy". United presents a picture of greedy private industries wishing to gobble up all available gas for their own selfish use, to the detriment of other consumers and the public in general. United claims that any diversion of interstate gas into the Green System-East was because it was absolutely necessary to

meet contract deliveries. United supports the Commission finding as in the best interest of the consuming public. Agreeing with United on this point, at least as far as its consumers go, is the Public Service Commission for the State of New York. New York intervened, alleging its fear that United would divert substantial amounts of gas dedicated to the interstate market, including New York consumers, to fill these Green System-East contracts unless the federal authorities exercised control.

Thus, the battle line is drawn and, as usual, the dispute is not over gas alone, but also money. In reviewing the Commission's opinion, we must put away these self-serving charges and countercharges and look to the legal issues of the requisites for federal jurisdiction. In light of the Supreme Court's directive in *Louisiana Power & Light Co.*, supra, our task must begin with the FPC's decision.

II.

Opinions 610 and 610-A

The first question which the FPC faced in entertaining United's request was whether or not the Green System-East was indeed a jurisdictional pipeline. Noting that none of the interconnections at which United alleged interstate gas to have flowed into the Green System had been certificated by the Commission, the FPC stated that "the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the . . . facilities". In its presentation, United had marked a map of its system showing the points at which interstate gas had been injected into the Green System. The amounts of gas injected at each of these points, as found by the Commission, are set out in the margin.[1] Having found that gas which ultimately

[1] (b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for inter-

state commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United Received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426

found its way into the Green System had at one time been transported in a pipeline which carried interstate gas even though all the gas was produced within Louisiana and had never physically been outside the state,[2] the Commission went ahead to decide whether or not the amount gave it jurisdiction.

The Commission found that the amounts involved were substantial and were sufficient to give the Commission jurisdiction. On peak days for 1970 and 1971 which were chosen, the Commission figures showed that 153,376 Mcf and 189,846 Mcf, respectively, flowed into the Green System-East. The Commission rejected a *de minimis* argument made by several of the petitioners stating that the interstate portion of the gas on peak days represented 7.79 percent of the requirements and on an annual basis, 2.39 percent of the requirement.[3] Several of the parties dispute these findings made by the Commission, especially the holding as to the total amount introduced into the Green System-East. We will discuss these points in more detail later in the opinion.

Viewing the total picture presented by all the various factors in the record before it, the FPC found that the Green System was an integrated part of United's interstate (or Black) system and that the Green System-East could no longer be left to state regulation as a purely intrastate pipeline. We note that the Commission some-

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Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

[2] This is in dispute, but it is clear that some gas once carried in the Green System-East ends up in an *interstate* pipeline owned by Mid-Louisiana, but in all probability this gas does not physically leave Louisiana.

[3] Adjustments raise these figures to 10.7% and about 3.4%, respectively.

what retreated from its suggestion that Green System gas flowed out of the State of Louisiana in a physical form. In Opinion 610-A, the FPC stresses that its finding that Green System gas is introduced into mid-Louisiana's pipeline is simply to show that it is commingled with gas which has moved in interstate commerce. This factor, according to the FPC, gives support to its holding that the Green System has become integrated with interstate systems even though the gas itself never flows out of the state.

The FPC went on to hold that jurisdiction was not to be determined by the amounts of gas involved. They held that jurisdiction attached wherever even an infinitesimal amount of interstate gas was injected into the system. For these purposes, the Commission defines interstate gas as any gas which had ever been carried in a certificated interstate pipeline.

Section 1(c) of the Natural Gas Act, commonly known as the Hinshaw Amendment, provides an exemption from federal regulation wherever all the gas received by the system is to be consumed wholly within the state. The Commission refused to apply the Hinshaw exception, apparently finding that the Green System-East was an integrated facility and part of United's total system.

Relying on *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), and this court's Florida Parishes opinion, *Louisiana Public Service Commission* v. *FPC*, 5 Cir. 1966, 359 F.2d 525, the FPC held that there had been sufficient commingling of intrastate and interstate gas to require that the Commission take jurisdiction over the Green System-East. The Commission also expressly rejected the argument that United had illegally and improperly introduced interstate gas into the Green System-East. First, it found the amounts injected were necessary to meet contract commitments, but, more importantly,

stated the existence of jurisdictional facts controlled no matter what the motive.

Commissioner Carver dissented from Opinion 610. His primary reason for dissenting was his feeling that this circuit's opinion in *Louisiana Power & Light* v. *United Gas Pipe Line Co.*, 456 F.2d 326, which had not yet been passed on by the Supreme Court, was controlling and that the Commission was bound by *resjudicata*. In his remarks, Commissioner Carver criticized the Commission for failure to take account of what he felt were the obvious reasons that United was now seeking Commission jurisdiction. He pointed out that the long-term industrial contracts were no longer beneficial to United because of the low rate structure and impending supply crisis. He also referred to the protected curtailment that United had previously sought from the Commission. See *International Paper Company* v. *FPC*, 5 Cir. 1973, —— F.2d ——, [No. 71-3531, slip opinion dated February 7, 1973]. He further stated:

> Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands.

Following the petitions for rehearing, the Commission issued Opinion 610-A. In this opinion, the Commission retreated somewhat from its conclusion that Green System-East gas flowed out of the State of Louisiana. The Commission also attempted to clear up several other statements in Opinion 610 which were questionable. Commissioner Carver again dissented. He points out that the retreat as to Green System-East gas flowing out of the State of Louisiana undermined the entire finding of jurisdiction. Furthermore, he objected to the majority's use of "official notice" in considering flow charts not made a part of the record in the case without giving the parties an opportunity to present analysis of those flow diagrams. Commissioner Carver concludes that the in-

terstate gas which does flow into the Green System-East is so minimal and insignificant that the Commission should not take jurisdiction.

III.

At the outset, we note that the FPC has apparently decided to treat the entire Green System, formerly known as Green System-East and Green System-West, as a single unit for purposes of determining the existence of federal jurisdiction. In the past the Green System-East has been that part of United's New Orleans division facilities lying east of United's Napoleonville-Kosciusko interstate pipeline system. There is no abrupt stopping point for Green System gas when it reaches the Napoleonville-Kosciusko line; it simply continues to flow on toward the Baton Rouge area, but with the pipe denominated the Green System-West. Apparently this artificial division has been allowed to exist unchallenged for a number of years. In the past this one continuous pipeline has apparently been treated, for certification purposes, as two separate entities. The Green System-West has long been certificated while the Green System-East has been considered totally intrastate. As Commissioner Carver points out in his dissent to Opinion 610:

> However, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit, free of Federal regulatory impact, and free to contract in any manner it chose, consistent with State law.

In Opinion 610, however, the FPC indicates that at this time the whole New Orleans facility, the entire Green System, must be considered as a unit.

The FPC, in finding jurisdiction, relies heavily on the fact that gas which must be denominated interstate gas flows into and out of the Green System. The flow charts used by the Commission for the year 1969 show that 5,419,519 Mcf of gas were supplied from interstate lines into the Green System-East, that part of the Green System east of the Napoleonville-Kosciusko line. Aside from a minuscule and irregular injection of less than 14,000 Mcf at Point "K", this entire volume of gas was injected at Points "I" and "J". The FPC found that this gate was interstate in nature because it was taken from a commingled stream of gas designated for the interstate market. Both points "J" and "I" present similar factual situations since they both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading to United's interstate system, the other into the Green System-East.

The Commission also held that substantial quantities of interstate gas were delivered into the Green System at Points "L" and "M", which are both located west of the Napoleonville-Kosciusko line in the Green System-West. At point "L" over 38,000,000 Mcf is delivered into what is known as the Willow Glen Loop. This loop is also supplied with almost 7,000,000 Mcf directly from the Green System-West and it should be noted that this exit for Green System gas is located very close to the alleged breakpoint between the Green System-East and the Green System-West and that this injection of almost 7,000,000 Mcf is over three-fourths of the total volume which the so-called Green System-East delivers to the so-called Green System-West. At Point "M", the Napoleonville-Kosciusko line delivers approximately 2,000,000 Mcf into the so-called Green System-West. This

2,000,000 Mcf joins with the almost 2,000,000 left after delivery to the Willow Glen Loop and, with various further receipts and deliveries in the so-called Green System-West, continues on to the end of that pipeline for exchange into Mid-Louisiana's interstate pipeline for transportation and sale within the Baton Rouge area. It should be noted that the Mid-Louisiana line contains interstate gas flowing in from Mississippi.

Based on these injections and comminglings of interstate gas into and within the Green System, the Commission found that it had jurisdiction over the entire system. In its opinion, the FPC noted that, even without consideration of Points "L" and "M", after adjustments, about 3.4% of the Green System-East's annual requirements were supplied from these interstate gas sources. For the peak day of January 6, 1970, the adjusted figures did show that 10.7% of the flow into the Green System-East facilities was injected from interstate gas. The Commission expressly found that these quantities are not *de minimis*. The Commission expressly found that without these injections of interstate gas there would have been a serious deficiency to serve the New Orleans area. Furthermore, the Commission found that this deficiency will seriously increase in the next few years, especially during the peak winter months, with the result that more and more interstate gas would have to be diverted to satisfy commitments. Thus, the Commission has explictly held that the interstate injections are not minimal in amount nor are they of a temporary nature. Rather, the Commission feels that the amounts were significant, especially on peak days, and that continued delivery of interstate gas will be necessary to fill contractual obligations on the Green System-East.

Several, but not all, of the petitioners attack the Commission's use of a commingling theory based on *People*

of the State of California v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corporation*, 379 U.S. 687 (1965); and, most especially, our decision in *Louisiana Public Service Commission* v. *FPC*, 5 Cir. 1966, 359 F.2d 525 (commonly called Florida Parishes). In seeking to distinguish these cases the petitioners rely on this court's opinion in *Louisiana Power & Light Company* v. *United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326, in which we held that "the flow of gas from the Black System into the Green System in the case at bar is occasional and irregular as well as minimal". Id. at 339. The petitioners stress that our conclusion in that case was based on substantially the same evidence presented to the Commission and that we must now reach the same result.

As previously noted, the Supreme Court vacated that part of our opinion referred to above which held that there was no FPC jurisdiction over the Green System-East. 32 L.Ed.2d at 389. The Court held that the determination of jurisdiction was for the FPC in the first instance with our role limited to the normal processes of judicial review under the Natural Gas Act.

The Federal Power Commission was set up by Congress to bring a degree of regulatory expertise to the problems of regulating the transportation and consumption of natural gas, as well as other forms of energy. Because of their familiarity with the area in which they operate, the Commissioners are able to make substantially more accurate judgments than courts would be. Here the Commissioners have found that the injections of gas of an interstate character are not minimal and irregular, but are indeed substantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments. Because of our prior holding, it is almost certain we would not reach the same conclusion as an initial matter. However, ours is not to substitute our

judgment for that of the FPC on an issue where that body's intimate knowledge of the specific problems is concerned. We feel that determinations as to the amounts and constancy of the flow and their characterization in terms of impact and necessity therefor, once made by the Commission, cannot be lightly set aside by a court. In *Louisiana Power & Light* we were admonished by the Supreme Court to give the Commission the first chance to determine its jurisdiction in this case. The Commission has found that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. In making this latter determination, the Commission expressly considered and rejected the position of this court in *Louisiana Power & Light* as it applied to the facts found. Disagreeing with our holding that the injections were minimal, the FPC pointed out that the peak day injections were sufficient to heat over 100,000 homes. Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, Administrative Law Treatise § 30.05.

Among other things, the Commission found that any amount of interstate gas would give jurisdiction. The opinion seems to suggest that one molecule would be sufficient to automatically confer federal control. We do not reach or consider that issue in this opinion. It appears to this court that there would clearly be times when the amounts of natural gas involved would be so irregular and minimal that Commission jurisdiction would be absurd. However, as noted, the Commission has found that such is not the case as to the Green System-East and we find that to reverse the Commission on this point would simply be substituting our own judgment for that of the Commissioners, a luxury that we do not possess under our limited review.

Thus, we find we must sanction those parts of the FPC's Opinions 610 and 610-A which establish federal jurisdiction over the Green System as an interstate pipeline. We are somewhat troubled by the assertion of Commissioner Carver and several of the petitioners concerning United's motive in obtaining FPC jurisdiction. However, we do not feel that we have any available way to step in and sort out the competing inequities and reach what would be the fairest result for all concerned. That is the job for the Commission, and it is for the Commission to decide how to balance competing equities or how to penalize "unclean" parties in appropriate cases.

We would point out that federal regulation is not to be considered a plaything to be turned on and off to suit a pipeline's financial advantage. We feel confident that the FPC would not allow itself to be so used and are certain that courts would not allow such a practice to continue. Despite the innuendo and insinuation in this case, we see no direct evidence to support these suggestions of improper motive and conduct.

IV.*

The Hinshaw Amendment

Section 1(c) of the Act (the "Hinshaw Amendment") describes certain persons and facilities whose participation in the transportation and sale of gas in interstate commerce is "primarily of local concern and subject to regulation by the several States". 15 U.S.C. § 717(c). Under § 1(c) these persons and facilities are exempt from the jurisdiction of the Commission.[4]

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* Judge Bell authored Part IV, *The Hinshaw Amendment*, for the court.

[4] The text of the provision is the following:

> (c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the trans-

In the proceedings before the Commission the petitioners maintained that even if the gas transmitted through the Green System-East were interstate in character, the Commission would not have jurisdiction over it because the Green System-East falls within the provisions of § 1(c). The Commission held that the Green System-East is not an exempt facility within the meaning of that section. The petitioners contend this holding was erroneous. We disagree.

Congress enacted the "Hinshaw Amendment" to preserve state control over local distributors who purchase gas from interstate pipelines.[5] Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems.

We discern this intent in the legislative history. During the debate in both houses, supporters of the measure were at pains to emphasize that the proposed exemption

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portation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

[5] The amendment was necessary because of an early decision of the Supreme Court which, in construing the scope of the Commission's jurisdiction over the transportation and sale of gas "in interstate commerce", held that interstate gas does not lose its interstate character in the hands of local distributors who buy gas for resale and ultimate consumption within the state. *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950).

was not for the benefit of interstate pipeline companies. See, e.g., 99 Cong. Rec. 10569-70 (remarks of Congressmen Hinshaw, Harris, and Yates). Critics of the measure suggested that the exemption would provide interstate pipelines with a means of defeating federal jurisdiction over portions of their operations which deliver gas for consumption wholly within a single state. One senator suggested that if an interstate pipeline placed one of its state-wide delivery systems under the control of a wholly owned subsidiary and delivered gas to the subsidiary at the state line, the local system would qualify for exemption under the terms of the bill. See 100 Cong. Rec. 3173 (remarks of Senator Burke). Senator Bricker, one of the sponsors of the bill in the Senate, vehemently denied this:

> "[T]here is no intent to place any pipeline company outside the jurisdiction of either the Interstate Commerce Commission or the Federal Power Commission.
>
> "As soon as such a pipeline company were formed, it would come within the jurisdiction of the Federal Power Commission.
>
> "This measure is not an effort—and I make this statement for the RECORD—to remove such companies from the jurisdiction of the Federal Power Commission. If such an interpretation is made, it is without basis or support or foundation upon anything stated at any of the committee hearings." *Id.*

The congressional intent not to exempt local segments of integrated interstate pipeline systems from regulation by the Commission finds clear expression in the language of the statute. Thus, under § 1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive

as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same "person".

In the present case we are not called upon to define with precision the degree of independence that must exist between the person who gives and the person who receives gas at or within state lines in cases where the exemption is warranted. Nor need we consider the propriety of the Commission's prior determinations with regard to the availability or non-availability of the exemption in other cases. Under any plausible reading of the "other person" requirement, the Commission's determination in this case must be sustained.

By virtue of the flow of interstate gas from the Black System into the Green, the Green System-East has ceased to be an intrastate facility and has become, instead, a local branch of an integrated interstate pipeline. In all its relevant parts, this pipeline system is operated by one person: United. At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points—the points at which the exemption must take effect, if at all—the "person-to-person" requirement simply is not met.

Petitioners contend, however, that the requisite exchange from one person to another need not occur at the points where the exemption must take effect. They say that the person-to-person requirement may be satis-

fied by exchanges occurring at other points in the network of distribution or supply. Specifically, they claim that in this case the requirement may be satisfied by various exchanges that occur between the Black System and certain independent producers "upstream" of the points of connection between the Black System and the Green, or by various exchanges between the Green System and certain independent intrastate producers "downstream" of these points of connection.

The legislative history makes it clear, however, that in the contemplation of the supporters and the critics of § 1(c) the exchange between the two persons described in the statute took place at a point where an exemption was necessary to protect the receiver from federal jurisdiction that would otherwise exist under the *East Ohio* decision.[6] In other words, the point of the person-to-person exchange was a point where exemption was needed, and it was the point where the proposed exemption was to take effect. See the Senate and House debates, *supra*.

Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green System-East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the points of connection between the Black System and the Green—the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

The logic of a technical requirement that identifies the point of exemption with the point of the requisite exchange is apparent on the facts of this case. The

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[6] See Footnote 5.

contributions by independent producers of intrastate gas downstream of the points of connection between the Black System and the Green, or the contributions of interstate gas upstream of these points, do nothing to change the fact that the Green System is now a local branch of an integrated interstate system. Given Congress' overriding intent not to bifurcate the regulation of such system, these contributions should not enhance the Green System's eligibility for exemption under § 1(c). Under our interpretation of the person-to-person requirement, they do not.[7]

The Purple System

The "Purple System" is a pipeline system in United's Lafayette district in southwestern Louisiana. This pipeline system, like the Green System-East, has long been considered an intrastate pipeline not subject to Commission jurisdiction. Two parties, Cities Service Oil Company and Gulf States Utilities Company, challenge the FPC's holding of federal jurisdiction over the Purple System.

The FPC, without dissent as to these facilities, made specific findings showing that the Purple System is unquestionably an integrated part of United's interstate system. At Point "A", United obtained gas for the Lafayette facilities by exchange with an interstate transmission line of Texas Eastern Transmission Corporation. At Point "B" on the system map, United obtained over 1,000,000 Mcf on an annual basis from an interstate line of Texas Gas Transmission Corporation. At Point "C" on the flow chart, United delivered, on an annual basis, over 24,000,000 Mcf to Penzoil Pipeline Company for transportation across the Louisiana line into Texas. At Point "D", United received over 1,000,000 Mcf from

[7] Because we decide the Hinshaw issue on this ground, we need not consider the other grounds asserted by the Commission as a basis for its refusal to recognize the allegedly exempt status of the Green System-East.

Tennessee Gas Pipeline Company's interstate pipeline. At Point "H", over 16,000,000 Mcf were supplied into two streams, with a little over one-half being delivered into one of United's interstate pipelines for transportation out of the state, and the remainder used in the intrastate system. Finally, at Point "O", Tennessee delivered over 22,000,000 Mcf on an annual basis to United's Purple facilities which were commingled with locally produced gas and used in the Lake Charles area.

These facts amply establish that the Purple System is an integrated pipeline facility with many connections and exchanges of gas with interstate facilities. Gas clearly flows out of this system for interstate markets at Point "C". Significant volumes of gas from interstate facilities are introduced into the Purple System for local sale.

Cities Service attempts to distinguish the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases by stating that all the facilities used for transportation for delivery to Cities Service at its refinery are located in Louisiana and all of the gas used at the Cities Service plant originates at production points or exchange points within Louisiana. Cities Service alleges that this makes the pipeline system purely intrastate.

On the contrary, we feel the evidence clearly establishes that this Purple System is part of an integrated pipeline network involving significant transportation of interstate volumes. We feel that the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases cannot be distinguished successfully. We will not "lop off" certain parts of the otherwise integrated system to create an artificial intrastate pipeline.

For the reasons set forth above, the result reached by the FPC in Opinions 610 and 610-A with regard to jurisdiction over the Green System and Purple System is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1972

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185 and 72-2188

FPC No. CP71-89

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC., and CITIES SERVICE OIL COMPANY, ET AL.,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges

JUDGMENT

This cause came on to be heard on the petitions of Louisiana Power & Light Company and Texaco, Inc., and Cities Service Oil Company, Et Al for review of orders of the Federal Power Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the Federal Power Commission are hereby affirmed;

It is further ordered that petitioners pay to respondent-intervenor, United Gas Pipe Line Company the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1973

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC.,
and CITIES SERVICE OIL COMPANY, ET AL.,
Petitioners,
versus
FEDERAL POWER COMMISSION,
Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion June 28, 1973, 5 Cir., 1973, —— F.2d ——).

(September 5, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CERTIFICATES — COST OF SERVICE — DELIVERABILITY — END USE — FINANCIAL AND ECONOMIC FEASIBILITY — GAS SUPPLY — INTERCONNECTION — JURISDICTION — MARKETS — SALES FOR RESALE — TRANSMISSION FACILITIES — VOLUMETRIC LIMITATIONS

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

OPINION NO. 610

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

OPINION AND ORDER FINDING JURISDICTION AND REMANDING PROCEEDING FOR RECEIPT OF ADDITIONAL EVIDENCE

(Issued February 9, 1972)

NASSIKAS, Chairman:

1. United Gas Pipe Line Company (United) filed on October 1, 1970, an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing certain operations, sales and services. Specifically, United seeks to have added to its existing certificated system two large service areas in Louisiana and a few sales for resale and services in Texas. United avers that it now seeks to obtain a certificate authorizing the aforementioned operations, sales, and services because of the Commission's holding

in the *Florida Parishes* case[1] to the effect that the commingling in transmission facilities of gas moving in interstate commerce with local or intrastate gas makes the operation of the facilities, as well as the sales and services rendered by means of such facilities, subject to the Commission's jurisdiction.

2. A hearing was held in this proceeding from June 7, 1971, through June 18, 1971.[2] At the conclusion of the hearing United moved for omission of the intermediate decision procedure and that motion was granted by the Commission's order issued July 2, 1971. Thereafter, 17 parties filed initial briefs and 16 submitted reply briefs.[3] Since this order is in the nature of an interim decision pending the receipt of additional evidence upon remand,

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[1] *United Gas Pipe Line Co.*, 30 FPC 560 (1963), *aff'd sub nom. Louisiana Public Service Commission* v. *F. P. C.*, 359 F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966).

[2] The following parties have intervened in the proceeding: Algonquin Gas Transmission Company; Boise Southern Company; The Parish of Cameron, Louisiana; Town of Carencro, Louisiana; Cities Service Oil Company; Consolidated Gas Supply Corporation; Gulf States Utilities Company; Humble Oil & Refining Company; Laclede Gas Company; State of Louisiana; Louisiana Gas Service Company; The Louisiana Municipal Association; Louisiana Power & Light Company; The Louisiana Public Service Commission; Mid-Louisiana Gas Company; The Public Service Commission of the State of Missouri; Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; Monsanto Company; National Gypsum Company, Scott Paper Company and Stauffer Chemical Company; The City of New Orleans, Louisiana; New Orleans Public Service, Inc.; The Public Service Commission of the State of New York; The Ohio Fuel Gas Company and The Manufacturers Light and Heat Company; Shell Oil Company; Southern Natural Gas Company; Texaco Inc; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Towns of Walker and Livingston, Louisiana; and United Gas, Inc.

[3] On November 2, 1971, the State of Louisiana, Louisiana Municipal Association and Parish of Cameron, Louisiana, filed a motion for permission to file a late reply brief submitted therewith. We have accepted the brief for filing and have considered the arguments made therein.

which we order herein, the arguments of the parties will not be referred to herein except in a few minor respects. The oral arguments requested by some parties are denied because the deficient record would make the holding of oral argument nonproductive at this stage of the proceeding.

JURISDICTIONAL ISSUE

3. The first issue to be resolved is whether the Commission has jurisdiction over the operation of the facilities involved and over the sales and other services being rendered by means of such facilities. That question must be determined on the basis of the gas flow in the areas concerned as shown by the evidence.

(1) *Description of Texas Facilities, Sales, and Services*

4. United's evidence shows that it has already received a certificate from the Commission authorizing the construction and operation of all the transmission facilities which it owns and operates in its Victoria Division of Texas. The Victoria Division extends along the Texas Gulf Coast from a point near Agua Dulce to a point northwest of Houston. United's testimony shows that it has never obtained a certificate authorizing the sale of gas from the Victoria Division to distributors which resell the gas in 14 communities, nor has United ever obtained a certificate authorizing it to deliver gas to the 7 direct industrial customers which it serves from its facilities in the Victoria Division.

5. United's flow diagrams show that United has a single integrated pipeline system in the Victoria Division. Gas is delivered into the system from numerous gas fields and travels out of the State of Texas in interstate commerce except for deliveries made from the interstate facilities to the 14 communities and 7 direct-sale customers which United seeks authorization to serve.

(2) *Determination of Jurisdiction Regarding Victoria Division*

6. There appears to be no doubt but that the Commission has jurisdiction over the 14 sales for resale and the transportation and delivery of gas to the seven direct-sale customers of the Victoria Division. In *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965), the Supreme Court affirmed the Commission's assertion of jurisdiction over the sale and transportation of gas in *Montana-Dakota Utilities Co.*, 30 FPC 200 (1963). In the *Amerada* case the interstate pipeline company purchased gas at the tailgates of three gasoline plants within the State of North Dakota and commingled in the same pipeline gas which was contractually destined for use only within the State with gas purchased from the three plants for use outside of the State. The Commission held that the commingling of the so-called intrastate gas with the gas moving out of the State converted all the sales from the gasoline plants into sales for resale in interstate commerce subject to the jurisdiction of the Commission. In the *Florida Parishes* case *supra* the Commission stated that "* * * The removal of a portion of the gas thus flowing in interstate commerce does not change the gas removed from the stream into intrastate gas" (30 FPC at 563).

7. Since the evidence in this proceeding shows that United purchases gas from many sources for transportation and resale in interstate commerce and commingles the gas traveling to markets outside the State with gas delivered to customers within the State, all sales for resale and deliveries to direct-sale customers within the State are subject to the Commission's jurisdiction under the rationale expressed by the Commission in the *Florida Parishes* and *Amerada* cases.

8. However, the Commission at this time does not believe it would be in the public interest to grant a certifi-

cate with respect to the Victoria Division because United's evidence is unclear in some respects. Specifically, United did not make it clear in its exhibits whether it is now rendering some service pursuant to Commission authorization and wishes to have additional sales for resale and services certificated, or whether it is now rendering no service in the Victoria Division pursuant to Commission orders and now wishes to obtain a certificate covering all sales for resale and services being performed in the Victoria Division. United's evidence should also clarify whether sales to pipeline companies shown on the flow diagrams have been certificated, whether any of the other deliveries shown on the flow diagrams have heretofore been certificated, and whether the flow diagrams reflect all services and sales being rendered, or only those for which a certificate is requested. United's evidence in the remanded proceeding should show whether the Victoria sales and services have heretofore been included as requirements to be met when presenting gas reserve and deliverability data to the Commission in certificate cases or in the preparation of its Form 15. Additionally, United should present evidence with respect to alternate sources of gas supply for the Victoria customers.

(3) *Description of Louisiana Facilities, Sales, and Services*

9. The certificate which United seeks for Louisiana facilities, sales, and services would not only cover authorization to make sales for resale and deliveries of gas to direct-sale customers, but would also grant authority to operate the facilities by means of which such sales and services are rendered.

10. The facilities involved are situated in that portion of United's service area known as the New Orleans Division which is located entirely in Southern Louisiana south of Marksville, Louisiana. The New Orleans Divi-

sion is further subdivided into two districts called the Lafayette District and the New Orleans District. The Lafayette District lies in the western part of Southern Louisiana west of Baton Rouge and Napoleonville, while the New Orleans District is situated in the eastern part of Southern Louisiana and includes Baton Rouge and Napoleonville.

11. Since United operates an existing interstate pipeline system in Southern Louisiana under certificates issued by the Commission as well as the facilities comprising the Lafayette and New Orleans Districts, United's evidence includes maps which use three colors to differentiate the various facilities and service areas. The certificated transmission lines are shown in black, the Lafayette District facilities are depicted in purple, and the New Orleans facilities are outlined in green. Throughout this opinion the purple facilities will be referred to as the Lafayette facilities and the green facilities will be referred to as the New Orleans facilities. United's application requests that the Commission certificate the Lafayette and New Orleans facilities and all sales and services rendered by means of such facilities.

12. Although United's Exhibit 1 shows letter designations from "A" through "W" to indicate that there are 24 points where interstate gas enters the Lafayette and New Orleans facilities, none of those interconnections has ever been certificated by the Commission. Thus, the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the Lafayette and New Orleans facilities. Diagrams showing the flow of gas on an annual basis (for the 12 months ending December 31, 1969) were presented by United in support of its belief that the Lafayette and New Orleans facilities are now integrated with its interstate system. The Commission has examined both the annual flow diagrams and the flow diagrams

for the peak day of January 6, 1970, which were received in evidence as Item E (Tr. 558). In addition, the Commission has taken official notice of United's flow diagrams for the peak day of March 3, 1971, which were filed July 7, 1971, pursuant to Section 260.8 of the Commission's Regulations under the Natural Gas Act.

13. While United's Exhibit 1 shows 24 points indicating where interstate and uncertificated gas supplies may be commingled, scrutiny of the 12 points which were discussed in the cross-examination of United's witnesses is sufficient to establish that the operation of United's Lafayette and New Orleans facilities are presently subject to the Commission's jurisdiction.

(a) *Flow of Interstate Gas in Lafayette Facilities*

14. At point "A" on Exhibit 1 there is an interconnection between an interstate transmission line of Texas Eastern Transmission Corporation and a Lafayette pipeline lying north of the City of DeQuincy. Since this interconnection is a point at which United exchanges gas with Texas Eastern, the flow diagram shows no annual volumes to be entering United's system, but on the peak day of March 3, 1971, Texas Eastern delivered 105,173 Mcf of which approximately half traveled southeasterly toward the Lake Charles area and the remaining volume was transported northwesterly into the Leesville area.

15. Point "B" on Exhibit 1 is located at an interconnection between Texas Gas Transmission Corporation's interstate line and a Lafayette pipeline near Iowa, Louisiana. On the annual basis Texas Gas delivered 1,371,681 Mcf to United at that point and on the peak day of March 3, 1971, United received 17,636 Mcf from Texas Gas at that point. The gas was commingled with intrastate gas and sold to customers in the Lake Charles area.

16. Point "C" is located on the western boundary of the State of Louisiana southeast of Beaumont, Texas. At that place a Lafayette pipeline interconnects with Pennzoil Pipeline Company's facilities which transport gas into Texas. On an annual basis 24,254,556 Mcf are delivered to Pennzoil and on the peak days of March 3, 1971, and January 6, 1970, volumes of 1,075 Mcf and 58,399 Mcf, respectively, were delivered to Pennzoil for transportation out of the State of Louisiana.

17. At point "D" United receives gas in the East Cameron Area from Tennessee Gas Pipeline Company's interstate pipeline and such gas is transported along with locally-produced gas to consumers in the Lake Charles area. On an annual basis Tennessee delivered 1,357,396 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 24,079 Mcf and 41,323 Mcf, respectively.

18. At point "H" gas produced in the Lawson field area is delivered into a pipeline extending from Lafayette to Bancroft. Although all of the gas received at this point is produced in Louisiana, the gas is split at the point of delivery so that out of 16,594,766 Mcf received on an annual basis, 9,717,494 Mcf are transported easterly for delivery into one of United's interstate pipelines transporting gas out of the State, while the remainder is transmitted to a market in the Leesville area. On the peak day of March 3, 1971, 38,138 Mcf entered the line and all of it was transported out of the State. Of the 38,429 Mcf delivered from the Lawson field on the peak day of January 6, 1970, 21,395 Mcf were transported out of the State while the remainder was consumed in local markets.

19. At point "O" Tennessee delivers gas to United from its interstate line near Iowa, Louisiana. On an annual basis Tennessee delivered 22,138,127 Mcf and on the peak days of March 3, 1971, and January 6, 1970,

Tennessee delivered 47,919 Mcf and 117,173 Mcf, respectively. The gas is transported by United with locally-produced gas and consumed by customers in the Lake Charles area.

(b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline

and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

(c) *The Unauthorized Gas Flows Establish Jurisdiction*

26. The foregoing description of the flow of interstate gas in United's Lafayette and New Orleans facilities shows beyond any doubt that United's introduction of substantial quantities of gas into those uncertificated facilities from its interstate gas sources is a sufficient

commingling of interstate and uncertificated gas supplies to bring the operation of the Lafayette and New Orleans facilities, together with the sales and services made from those facilities, within the Commission's jurisdiction under the Natural Gas Act.

27. As indicated in the foregoing discussion of delivery points, on the peak days of 1971 and 1970, interstate volumes of 189,846 Mcf and 153,376 Mcf, respectively, flowed into the New Orleans District facilities. Those volumes would be adequate to heat well over 100,000 single-family residences on a cold day.

28. A *de minimis* argument is advanced by certain parties with respect to commingled gas in that portion of the New Orleans District, referred to as the Green System-East, located east of the Napoleonville-Kosciusko line. New Orleans Public Service Inc. (NOPSI) offered Exhibit 22 showing that deliveries of interstate gas by United into the Green System-East represented 7.79 percent of peak-day requirements and 2.39 percent of annual requirements for the 12 months ended July 31, 1970.

29. A comparison of the adjusted flow diagrams upon which Exhibit 22 is based[4] with United's actual flow data on file with the Commission, referred to previously, shows that the actual peak-day deliveries from gas supply sources differ from the adjusted flows in almost every instance.

30. At Bastian Bay (point "I") where interstate gas entered the Green System-East the actual volumes shown for the peak day, January 6, 1970, exceeded the adjusted flow by 19,489 Mcf. This increases the percentage

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[4] Exhibit 22 indicates that the source for the data shown therein was United's response to FPC Staff Request No. 38 in Docket No. RP71-41, prepared for United's rate proceeding in that docket, which consisted of flow diagrams captioned "adjusted".

of peak-day injections of interstate gas into the Green System-East from 7.79 percent to 10.7 percent. A review of the same data with respect to the annual volumes of interstate gas flowing into the Green System-East indicates that the 2.39 percent should be increased to about 3.4 percent. We find that these quantities are not *de minimis*.

31. Furthermore, United projects the peak-day demand in the New Orleans-Baton Rouge area to be at a level of 1,002,000 Mcf during the 1971-72 winter period with a projected intrastate supply of only 413,000 Mcf (Tr. 91-92). Accordingly, United shows that there is a peak-day deficiency in gas supply of 598,000 Mcf which it contends must be supplied by interstate sources. On the basis of this evidence, there would be a substantial gas supply deficiency in the City of New Orleans area, within the Green System-East, of approximately 448,000 Mcf per day during the 1971-72 winter heating season which would be met with volumes from interstate sources transported through certificated interstate facilities. Moreover, United contends that this deficiency[5] will increase for the peak day of the 1972-73 winter heating season and that it will be necessary for United to in-

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[5] A question has been raised as to whether a producer affiliate of United has gas available, which can be delivered into either interstate or uncertificated facilities, in sufficient quantities to meet the New Orleans District's deficiencies and thereby obviate the need for United to obtain gas from its interstate sources. Even assuming that the Commission sanctions such an arrangement, we find no evidence to support that proposition; to the contrary, the evidence in the record indicates that on peak days gas from interstate sources in volumes of about 600,000 Mcf will have to be introduced into the New Orleans District. To test the possibility of obtaining gas in those quantities from Lirette sources, we have examined both the Form 15 and System Flow Diagram reports filed pursuant to our regulations. The data from those sources show that the peak-day flows from Lirette to *any* destination would fall short of meeting the requirements by several hundred thousand Mcf.

crease its deliveries into the Green System-East if that system is to remain on a parity with all other systems.[6]

32. Mr. Echterhoff testified at Tr. 91-92 that the peak-day deficiency of intrastate reserves for meeting the needs of the New Orleans District would be 684,000 Mcf in 1972-73, *i.e.*, the requirements were 1,018,000 Mcf and the "intrastate" reserves were 334,000 Mcf. Thus, 67.2 percent of the peak-day requirements would have to come from *interstate* sources.

33. If the Green System-East (or New Orleans area by itself) is isolated from the Willow Glen-Baton Rouge area, the needs for the New Orleans area by itself amount to 542,000 Mcf. The deficiency would be made up by obtaining interstate gas from the Bastian Bay-Lirette-Mobile system.

34. Testimony in the record of the case reveals that the peak-day deficiency on the Green System would result in approximately 70 percent curtailment of the Green System, including the New Orleans distributor—the company upon which human needs customers depend. To test this testimony, we have taken notice of the filings required by our regulations.

35. The peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations as well as the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities. We examined the peak-day flow diagrams for several reasons. First, it is important in this proceeding to understand the impact on United's existing interstate customers resulting from deliveries of gas to the New Orleans and Lafayette Districts on peak days because those volumes are illustrative of the extent of curtailments to United's existing customers which will be nec-

[6] See also Exhibits 3 and 34.

essary in order for the uncertificated markets to be served on cold days. Second, Section 157.14(a)(8) requires the submission of peak-day flow diagrams as a part of all certificate applications in order to show the applicant's ability to serve its proposed customers on the day of maximum demand. Third, the Commission normally examines peak-day flows in determining jurisdiction. See, *e.g.*, *Florida Parishes*, *supra*, 30 FPC at 564, and *Amerada*, *supra*, 30 FPC at 203. Fourth, some of the parties had relied on Exhibit 22 showing peak-day flows based on flow diagrams which were introduced in United's rate proceeding in Docket No. RP71-41, and it was appropriate that the Commission examine peak-day flow diagrams which reveal actual flows of gas on the peak day rather than the adjusted flows which were utilized in the flow diagrams submitted in the rate proceeding.

36. We have examined all available data in finding that the uncertificated facilities, as well as the sales for resale and transportation services rendered thereby, are subject to the Commission's jurisdiction. In addition, the annual flow diagrams which were a part of the record reveal that gas flows out of the Green System-East.

37. The testimony (Tr. 326) indicates that point "M" is at the extreme west end of the Green System-East. At that point 8,256,920 Mcf left the Green System-East and entered the Green System-West and of that volume 6,879,259 Mcf were transported toward Willow Glen while the remaining 1,377,661 Mcf were transported toward Baton Rouge and commingled with 2,055,759 Mcf of interstate gas delivered into the Green System-West from the Napoleonville-Kosciusko interstate pipeline. The commingled stream of Green System-East and interstate gas thereafter was used to serve markets in Louisiana and ultimately provided 2,054,190 Mcf at point "U" for delivery to Mid Louisiana Gas Company's interstate pipeline which extends out of the State of Louisiana.

38. The importance of examining both annual and peak-day flow diagrams becomes obvious from the foregoing illustration because the peak-day flow diagram for March 3, 1971, shows that 22,811 Mcf were transported out of the Green System-East into the Green System-West but were thereafter commingled with interstate gas and wholly used in the Willow Glen area. Although 38,557 Mcf were delivered to Mid Louisiana on that day at point "U", none of the Green System-East gas is shown to be flowing beyond the Willow Glen pipeline. Of course, gas does flow out of the Green System-East on both a peak-day and an annual basis, but the Green System-East gas does not appear to flow out of the State of Louisiana except on an annual basis.

39. We have considered the volumes delivered at all points in our discussion with respect to the flow of gas in the Lafayette and New Orleans Districts. Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities. It is unnecessary for us to separate interconnection points in the Green System-East from those related to the Green System-West because the New Orleans District is situated in the eastern part of Southern Louisiana and *includes* Baton Rouge and Napoleonville.

40. As previously stated, we have considered the actual peak-day volumes as set forth in United's flow diagrams filed pursuant to Section 260.8 of our Regulations and the adjusted volumes which were shown on the flow diagrams presented in United's rate case in Docket No. RP71-41 that were used by the witness sponsoring Exhibit No. 22 from which the 2.39 percent commingling figure is obtained.

41. In addition to the adjusted volumes used in United's rate proceeding in Docket No. RP71-41, it should be noted that if we had referred to the flow diagrams submitted by United in its most recent rate proceeding in

Docket No. RP72-75, we would have been provided with data showing that much larger volumes of gas are to be transported on both a peak-day and annual basis into the Green System-East. To be specific, instead of a zero volume entering the Green System-East at point "J" on the peak day of March 3, 1971, the adjusted figure would be 86,766 Mcf, and instead of 72,990 Mcf entering the Green System-East at point "I" on the peak day of March 3, 1971, the adjusted figure would be 108,371 Mcf. Similarly, instead of an annual volume of 2,119,631 Mcf entering the Green System-East at point "J", the adjusted figure would be 1,371,196 Mcf, and instead of an annual volume of 3,286,407 Mcf entering the Green System-East at point "I", the adjusted figure would be 11,024,-446 Mcf. Since the adjusted figures used in Docket No. RP72-75 are attempting to estimate volumes for the 1971-72 heating season, they indicate that the Green System-East is expected by United to become increasingly reliant upon deliveries from United's interstate facilities in order to meet the uncertificated market's gas requirements.

42. In determining the jurisdictional issue, however, we do not believe that the relative level of the volumes involved are controlling. Section 1(b) of the Act does not delimit the amount of gas to be tranported or sold in interstate commerce necessary for the exercise of Commission jurisdiction.

43. The case of *Connecticut Light & Power Co.* v. *F.P.C.*, 342 U.S. 515, 535-36 (1945), arising under the Federal Power Act, is instructive in this regard. There the Supreme Court, addressing itself to a *de minimis* argument, stated:

> Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about

one-fifth of one percent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state * * * Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is overextending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

44. Our decision herein is in accord with *Federal Power Commission* v. *Florida Power & Light Co.* (U.S. Supreme Court No. 70-38, decided January 12, 1972, —— U.S. ——, 40 LW 4141) wherein the Supreme Court held that an electric utility was subject to the jurisdiction of this Commission because energy transmitted by it was commingled with energy transmitted by a jurisdictional company. There the issue was whether any energy was transmitted in interstate commerce *at all.* As the Court stated the test is not how much, but whether; "* * * no matter how small the quantity, FPC jurisdiction will attach because it is settled that Congress has not 'conditioned the jurisdiction of the commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction'" (Slip Op., p. 9, n. 10). The dissent noted that the commingling is minuscule and incidental.

45. The Louisiana Public Service Commission and several other parties contend that the Green System-East

should be exempted from Commission jurisdiction under Section 1(c) of the Act.[7] The argument is made that to the extent some volumes of interstate gas have been delivered into the Green System-East such gas has been received, transported, and consumed wholly within the State of Louisiana, and that since the rates, services and facilities of the Green System-East are regulated by the Louisiana Public Service Commission, the requirements for exemption under Section 1(c) have been met. United maintains that Section 1(c) is inapplicable since the Louisiana Public Service Commission may not regulate direct sales,[8] and that granting an exemption under Section 1(c) would leave a regulatory gap.

46. Staff opposes an exemption on additional grounds. It dismisses initially the assertion that Section 1(c) is

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[7] Section 1(c) of the Act reads as follows:

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

[8] Art. 6, Sec. 4 of the Louisiana Constitution, as amended in 1964, provides in pertinent part that: "* * * the [Public Service] Commission shall have no power or authority to supervise, govern, regulate, and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in such sale of natural gas."

self-executing and that no application therefor nor showing in support thereof need be made, citing the provision in the Section requiring an evidentiary showing with respect to State commission jurisdiction. Section 1(c) is applicable, argues Staff, only "* * * if all the natural gas so received is ultimately consumed within such State", and that is not the case with all the gas received by United from other persons in Louisiana, *e.g.*, deliveries from the Getty plant at Bastian Bay. It also contends that the "from another person" requirement of the Section is overlooked by those seeking an exemption.

47. The proponents of Section 1(c) exemption agree that United's Green System-East receives gas from United's system, but seek succor by citing the case of *Mountain Gas Company*, Docket No. CP68-303, and *Cabot Corporation*, Docket No. CP68-176, 42 FPC 305, *aff'd sub nom. Public Service Commission of West Virginia* v. *F.P.C.*, 437 F.2d 1234 (4th Cir. 1971), for the proposition that the gas need not be received "from another person" as plainly set out in Section 1(c). In our view *Mountain Gas* is inapposite since most of the gas there in question was purchased from another person.[9] Noting that Section 1(c) is applicable solely "to any person engaged in or legally authorized to engage in the transportation of gas in interstate commerce," Staff additionally asserts that the arguments of the parties favoring exemption are inconsistent with their contention that the Green System is an entirely separate intrastate entity. This apparent inconsistency has no bearing on our determination of this question, as we reject the tortured reasoning which would artifically maintain a division of the integrated facilities of United's system. We find that a

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[9] In that case part of the gas was received by Cabot from its own wells at some of the facilities proposed to be exempted. The bulk of the gas, however, was purchased from Tennessee Gas Pipeline Company.

Section 1(c) exemption does not obtain in the circumstances presented.

48. The Louisiana Commission does not regulate any aspect of direct sales and thus, in any event, an exemption would not be available, even to a separate pipeline company.[10] This Commission, on the other hand, has substantial regulatory authority over the service of gas to direct customers. Deliveries to direct customers cannot be made without a certificate from this Commission and the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of those transactions.[11] In addition, the Commission, pursuant to Section 7(b), must determine whether service to a direct customer or any other customer should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. While the absence of State regulation is not material to a determination of our own jurisdiction, it nevertheless follows that the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State and therefore contribute measurably to the regulatory process.

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[10] We take official notice of a letter to this Commission, dated June 16, 1971, in which the Chairman of the Louisiana Public Service Commission indicated that the Louisiana Commission does not exercise jurisdiction over direct sales to industrial customers. We note that 1(c) exemptions have been previously granted within Louisiana. See *Central Louisiana Electric Co., Inc.*, Docket No. CP62-129, 27 FPC 374 (1962); *United Gas Pipe Line Co.*, Docket No. CP68-203, and *Sugar Bowl Gas Corp.*, Docket No. CP68-204, 39 FPC 619 (1968). However, we note that in each case that there was no disclaimer of jurisdiction by the Louisiana Public Service Commission, as in this case.

[11] *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 232 F.2d 467, 471 (5th Cir. 1956).

49. We recognize, however, that the State purports to regulate sales for resale in the New Orleans and Lafayette Districts. While our assertion of jurisdiction herein would substitute Federal regulation for State regulation over such sales, the substitution of Federal regulation occurs simply as a consequence of our determination that these sales are in interstate commerce and the fact that State regulation will be affected has no bearing on our determination. Moreover, the exercise of our jurisdiction over sales and services in interstate commerce does not impinge upon State regulation of sales and services by the distributors receiving gas from United.

50. In declining to grant United an exemption under Section 1(c) of the Act, we are aware that such an exemption was granted in *United Gas Pipe Line Co.*, Docket No. CP66-137, 35 FPC 172. However, that case involved a sale for resale over which the Louisiana Public Service Commission asserted jurisdiction; moreover, the gas was purchased from Transcontinental Gas Pipe Line Corporation, "another person" within the meaning of Section 1(c), and the facilities involved were not connected with United's interstate system. The present case is clearly distinguishable inasmuch as it involves direct sales, over which the Louisiana Public Service Commission has disclaimed jurisdiction, the gas is not purchased from "another person", and the facilities involved are directly connected to United's interstate system.

51. It is argued that United deliberately introduced interstate gas into the New Orleans District to bring about the situation that exists in order to serve its own interests with respect to its direct-sale contracts and curtailment plans. The alternative that this argument suggests is that the Commission should order United to desist from making any further deliveries into the New Orleans District. With the exception of two producers, no party to this proceeding suggests this course of action.

It appears from the record that were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak-day requirements.[12] Moreover, as we have noted herein, the Green System-East will have a considerable deficiency in its peak-day gas requirements for the current winter heating season, as well as for the next heating season. Thus, the jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination.[13]

52. We believe that no extended discussion of the applicable law is required in support of our jurisdiction under the circumstances presented. The Commission's opinion in *Lo-Vaca Gathering Co.*, 26 FPC 606 (1961), *aff'd sub nom. California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), followed by the Supreme Court's *Amerada* and the Fifth Circuit's *Florida Parishes* opinions *supra*, leaves no room for argument that the commingling of interstate gas with intrastate gas and the delivering of gas to intrastate markets from interstate pipelines are sufficient integration of interstate and intrastate operations to bring the uncertificated sales and facilities within the Commission's jurisdiction. As the court pointed out in the *Florida Parishes* case (359 F.2d 525 at 528):

> * * * The facts in each of those cases [*Lo-Vaca* and *Amerada*] more strongly supported the argument for state jurisdiction over the gas produced, gathered, transported and sold in the same state than do the facts of this proceeding. In each instance, however, the Supreme Court held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream

[12] See Exhibit 22.

[13] See *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17 (1920); *Price* v. *Western Union Telegraph Co.*, 156 Fla. 406, 23 So.2d 491 (1945).

gave the Commission jurisdiction "at the outset over the entire transaction".

53. We wish to make clear that the facilities, sales, and services in question became subject to our jurisdiction at such time as the commingling of interstate and intrastate gas took place. The Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural-gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. *J. M. Huber Corp.* v. *Federal Power Commision*, 236 F. 2d 550 (3rd Cir. 1956), *cert. denied*, 352 U.S. 971 (1956). *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349 (2nd Cir. 1971), *cert. denied*, —— U.S. —— (Sup. Ct. No. 70-216, October 12, 1971).

54. Although there is sufficient evidence in the record to find jurisdiction, we believe that certain aspects of United's operation of its facilities in the area in question require amplification. In the remanded proceeding United should present an Exhibit K setting forth the lengths and diameters of pipelines and other facilities in the Lafayette and New Orleans Districts for which it seeks certification. The original cost of all facilities should be shown together with accrued depreciation thereon.

55. During the cross-examination it appeared that United has previously obtained certificates to make sales from some of the uncertificated facilities. For example, although United seeks to have its Weeks Island pipeline certificated in this proceeding, the Commission issued on June 26, 1968, an order in *United Gas Pipe Line Co.*, 39 FPC 1029, certificating a sale to Humble Oil & Refining Company from that pipeline. Moreover, despite the fact that the order specifically restricts deliveries of gas to Humble to a maximum of 3,500 Mcf per day, Exhibit 17 indicates that United has delivered up to 7,010 Mcf per day to Humble at that point. Likewise, the Commission has apparently certificated some facilities near the

lateral line serving Baton Rouge, but United's witness was not clear as to what those facilities were or whether they are still used for the purpose for which they were originally certificated.

56. United should also include in Exhibit K a separate breakdown of the facilities comprising the 24 interconnections at which interstate gas may be injected into the Lafayette and New Orleans facilities. Inasmuch as United claims that increasing quantities of interstate gas will be needed to supply the Southern Louisiana market, it should explain where the increased quantities of interstate gas will be obtained and which of the 24 interconnections will be used for that purpose.

Certification Issues

(1) *Introduction*

57. As set forth in its opinion in *Kansas Pipe Line & Gas Co.*, 2 FPC 29 (1939), the Commission has considered five primary factors in determining whether a certificate of public convenience and necessity should be issued. Those five factors are whether a market for the gas has been shown, whether there is a gas supply available to serve the proposed markets for a time sufficiently long to justify the construction of the facilities, whether the facilities proposed to be constructed are adequate from an engineering point of view, whether the proposed sales will return sufficient revenues to enable the applicant to recover the cost of service involved in rendering the proposed sales and services, and whether the applicant will be able to obtain the financing necessary to construct the proposed facilities. United's application in this proceeding is unusual in that the facilities for which it seeks a certificate have already been constructed, the markets have already been attached, the gas is already flowing, the facilities have already been financed, and

proposed rate increases covering the sales involved are presently pending before the Commission.

58. Although the Lafayette and New Orleans Districts contain existing pipeline systems now in operation, those systems were constructed many years ago and have been operated as independent intrastate pipeline systems entirely separate from United's integrated interstate system over which the Commission exercises jurisdiction. Therefore, when United filed its application requesting that the Commission issue a certificate covering all the facilities, resales, and services being renderd in its Lafayette and New Orleans Districts, it was obligated to present evidence showing that the attachment of those facilities, resales, and services to the interstate pipeline system is required by the public convenience and necessity. While we recognize that with existing facilities certain conventional data may be omitted, we note certain deficiencies in the record as outlined below which should be the object of an additional evidentiary presentation.

(2) *Markets*

59. United's market evidence consisted of a tabulation of its resale and direct-sale customers showing the largest volumes which they have taken on non-coincidental peak days, but United failed to show what volumes it is obligated to deliver to its customers under the most recent service agreements and direct-sale contracts. Since United is operating under the curtailment provisions of its tariff at the present time,[14] any certificate issued should contain volumetric limitations in accordance with the Commission's Statement of Policy in Order No. 431 issued April 15, 1971, in Docket No. R-418. Therefore, in the remanded proceeding United should present as part of

[14] United is currently involved in a curtailment proceeding before the Commission in Docket Nos. RP71-29, *et al.*

its market evidence copies of the service agreements which it has most recently negotiated with its resale customers. If United's gas supply deficiency prevents it from proposing to deliver contractual volumes to its resale and direct-sale customers, it should make a separate tabulation of the actual volumes it expects to deliver in light of its current gas supply situation.

(3) *Gas Supply*

60. Since United is now curtailing deliveries to its customers, the Commission assumes that United has a deliverability of less than one year, but United did not present any evidence which would permit the Commission to evaluate the impact on the existing interstate customers that would result if the Commission were to certificate the service proposed to be continued in the Lafayette and New Orleans Districts. Therefore, United's gas supply evidence should show the volumes of gas which will be available to serve the existing interstate markets with and without the markets in the Lafayette and New Orleans Districts. Inasmuch as United claims that a much greater quantity of interstate gas will be needed to serve the Lafayette and New Orleans Districts within the next two or three years, its deliverability exhibit should project the impact on the existing interstate market if it were to be permitted to provide service from its interstate system to all of its customers in the Lafayette and New Orleans Districts.

61. United's shortage of gas raises the possibility that authorization of markets in the Lafayette and New Orleans Districts will result in the taking of disproportionate volumes of gas from existing industrial customers now being served with the gas supply previously committed to serving only interstate markets. Therefore, United's deliverability study should show to what extent the deficiencies in gas supply alleged for the Lafayette

and New Orleans Districts are based upon the requirements of industrial customers as compared with the needs of residential and commercial customers.

62. A question in this proceeding is whether customers who were being served from what has previously been an entirely separate intrastate system with its own gas reserves should now be allowed to continue to purchase gas from a gas supply which presumably was not committed to serving an uncertificated system and its customers.

(4) *Engineering Feasibility*

63. United's evidence consisted of flow diagrams showing net movement of gas on only an annual basis. The Commission has compensated for United's failure to present peak-day flow diagrams by examining the diagrams for January 6, 1970, which were received in evidence as Item E and by taking official notice of the flow diagrams for the peak day of March 3, 1971. At the remanded hearing the peak-day flow diagrams for March 3, 1971, should also be received in evidence as an item by reference to the Commission's files.

64. The Commission normally evaluates engineering and economic feasibility on the basis of the third-year volumes of gas to be served in a proposed market. Since United has previously served the Lafayette and New Orleans Districts with gas from fields located fairly close to the markets, it is essential that United show how increasing quantities of gas can be introduced into the Lafayette and New Orleans facilities so that the Commission will know whether additional facilities will have to be constructed to transport gas from interstate gas sources to markets in the Lafayette and New Orleans Districts.

(5) *Economic Feasibility*

65. To the extent that United addressed itself to the question of economic feasibility, it shows that the certificate should be denied because it claims that the direct-sale customers which are presently attached to the Lafayette and New Orleans facilities are noncompensatory since the rates in some of their contracts with United are so low that they do not cover United's average cost of purchased gas.

66. The Commission has for many years conditioned certificates to require pipeline companies and industrial customers to modify their contracts to remove "escape" clauses therefrom.[15] There have been instances where the Commission conditioned a certificate authorizing the expansion of a pipeline company's existing system upon the procurement of firm contracts with industrial customers to assure the economic feasibility of the proposed expansion.[16] In the remanded proceeding, if it is determined that the service United is rendering to industrial customers is non-compensatory, and if the certificate were otherwise required by the public convenience and neces-

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[15] In Houston Texas Gas & Oil Corp., 16 FPC 118 (1956), *aff'd sub nom. Florida Economic Advisory Council* v. *F. P. C.*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958), the Commission conditioned the certificate issued to require removal of clauses in contracts which would have permitted electric companies to pay transportation rates based on the competitive cost of oil. In *Northern Natural Gas Co.*, 22 FPC 164 (1959), *aff'd sub nom. Minneapolis Gas Co.* v. *F. P. C.*, 278 F.2d 870 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960), the Commission required a pipeline company to remove from its direct-sale contracts with electric companies clauses which would have permitted the electric companies to stop purchasing gas if the price of coal should become cheaper than the cost of gas.

[16] *Midwestern Gas Transmission Co.*, 22 FPC 775 (1959, *aff'd sub nom. Michigan Gas and Electric Co.* v. *F. P. C.*, 290 F.2d 374 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 897 (1961), *Northern Natural Gas Co.*, 30 FPC 859 (1963), and *Southern Natural Gas Co.*, 31 FPC 789 (1964).

sity, the Commission could consider granting the certificate conditioned to assure that the allocable cost of service to the direct industrial customers is recovered.

67. Before the Commission can determine economic feasibility, however, United should present an economic feasibility study showing the cost of service allocable for the Lafayette and New Orleans Districts. Such a study should show the deficit, if any, which would result from serving both resale and direct-sale customers in the Lafayette and New Orleans Districts.

68. Gulf States Utilities Company presented Exhibit 24 which indicates that United's full cost of service in the entire New Orleans Division (which includes both the Lafayette and New Orleans Districts as well as United's *interstate* transmission lines) ranges from 3.4 to 4.5 cents per Mcf exclusive of the cost of purchased gas. However, Gulf States' exhibit needs to be refined so as to allocate only to the Lafayette and New Orleans Districts that portion of the cost of the interstate pipelines which should appropriately be assigned to those areas. Despite the unrefined nature of its evidence, Gulf States shows that the rate in its direct-sale contract with United fails to pay United's full cost of service associated with serving Gulf States' generating plants. The Commission must determine whether to certificate direct sales which do not pay their full share of the cost of service.

69. In presenting its economic feasibility evidence in the remanded proceeding, United may utilize the same rates of return and depreciation which were employed in its last rate increase filings in Docket No. RP72-75. Use of such rates in a certificate case is illustrative of the highest costs the existing and proposed customers may have to pay and makes it possible to test the economic feasibility of proposed new service in light of rates being proposed for service to existing customers.

70. The foregoing discussion shows that the evidence in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity. We shall, therefore, remand the proceedings to the Presiding Examiner as hereinafter provided. Our determination that the Commission has jurisdiction over United's operations in the Victoria and New Orleans Divisions, however, requires that we address ourselves to the status of United's existing services in these Divisions pending the Commission's determination of the certificate issues.

71. In the absence of the issuance of a certificate at this time, we have two alternatives with regard to the existing service provided by United pending a Commission determination on remand: (1) the immediate termination by United of deliveries into the systems in question, or (2) the continuation of deliveries of interstate gas into these systems on an emergency basis pending final disposition of this matter.

72. Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970-71 heating season and, based on projections for the 1971-72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District. Moreover, the record does not disclose the impact on United's customers in the Victoria and New Orleans Divisions of an abrupt discontinuation of interstate deliveries into these systems.

73. In view of these facts, we believe that the public interest may best be served by continuation of United's service to prevent the undue hardship that might result from an immediate termination of interstate deliveries. We shall, therefore, authorize the continuation of such existing deliveries of interstate gas into the Victoria and

New Orleans Divisions on an emergency basis, subject to the condition that these facilities be operated as part of United's integrated interstate system fully subject to our exclusive jurisdiction. Thus due to the current shortage of gas on United's system, deliveries to customers in these Divisions shall be subject to the curtailment provisions of United's tariff, pending the Commission's decision in the remanded proceedings, and all other matters, rate or otherwise, shall be subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder.

74. We are aware that the finding of jurisdiction over the New Orleans and Lafayette Districts raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems. We do not consider this question herein. To assure equitable treatment we will permit those producers selling directly to facilities herein declared jurisdictional to file their contracts pursuant to Paragraph 12 of Docket No. R-389A for consideration by this Commission without prejudice to their right to challenge this opinion on appeal and without admitting that this Commission has jurisdiction over the sales in question.

75. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, —— F.2d ——, the court held that "* * * The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction" (Slip Op., p. 29). Since we respectfully disagree with the legal conclusion drawn by the court, we are constrained to consider the question of whether this Commission is precluded from making an independent decision based upon the record in the case before us.

76. We have examined the basic authorities on *res judicata* and estoppel by judgment and fail to find any

authority for the proposition that an administrative agency charged by Congress to determine its jurisdiction in accordance with the Administrative Procedure Act and the Natural Gas Act must terminate its proceedings when a court, in a collateral suit, reaches the jurisdictional question. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

77. We have considered such cases as *Commissioner* v. *Sunnen*, 233 U.S. 598 (1948), wherein the Supreme Court held the doctrine of estoppel inapplicable to subsequent relitigation by an agency of the same question decided adversely to it in court.

78. In *Otis & Co.* v. *S. E. C.*, 176 F.2d 34 (D.C. Cir. 1948), *rev'd per curiam*, 338 U.S. 843 (1949), SEC brought a suit in the District Court to require certain parties to testify in a concurrent administrative proceeding. Upon the court ruling against SEC, Otis then sought injunctive relief to terminate the administrative hearings. The District Court dismissed the suit and the Court of Appeals reversed. The Supreme Court upheld the District Court dismissal, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), *supra.*

79. In *Federal Water and Gas Corp.*, 188 F.2d 100 (3rd Cir. (1951), the SEC approved a plan which was ultimately affirmed in the Supreme Court. On subsequent order, the Court of Appeals attempted to modify the agency's order, but the Supreme Court prohibited this. This decision is not in point.

80. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), has no application to this situation since there was no question of forum or primary jurisdiction. The same is true of *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938).

81. In *U. S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), the Advisory Board of Contract Appeals held hearings in which the company asserted claims against the Atomic Energy Commission for additional

compensation and time extension. Subsequent to the decision, the respondent brought suit for breach of contract in the Court of Claims which ruled that the factual issues in the controversy should be resolved in a judicial trial. The Supreme Court held that the Court of Claims could review the administrative record, but could not retry the issues, which had properly been before the agency and which the parties had an adequate opportunity to litigate. This case is instructive, since it reflects the deference to administrative proceedings which we have asserted.

82. In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Federal Power Commission issued a license to construct and operate a hydroelectric project. The City petitioned the Court of Appeals on the ground that the City could not act in opposition to a State policy. The Court of Appeals affirmed the Commission's order and the Supreme Court denied certiorari. In regard to the bond issue, the State court enjoined the City and Supreme Court of Washington affirmed. The U.S. Supreme Court in granting certiorari stated that the bond validation suit was an impermissible collateral attack upon the final judgment of the Court of Appeals in the initial proceeding. There, again, the administrative proceedings were held to be primary.

83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The *LP&L* case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commision to decide the case;—the Commission did not—and could not—take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus

feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered.

The Commission finds:

(1) Appellant, United Gas Pipe Line Company, a Delaware corporation having its principal place of business in Shreveport, Louisiana, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of January 20, 1942, in Docket No. G-216, 3 FPC 3.

(2) United has introduced significant quantities of interstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965.

(3) The Federal Power Commission has jurisdiction under the Natural Gas Act and particularly Sections 2(7) and 1(b) thereof over the facilities, transportation, and sales for resale of natural gas by United by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

(4) United has failed to present sufficient evidence as required by the Commission's Regulations to permit the Commission to evaluate the factors entering into determining whether the certificate of public convenience and necessity requested by United should be issued or granted with conditions.

(5) The proceeding should be remanded to the Presiding Examiner in order to permit United to satisfy the evidentiary deficiencies which have hereinbefore been specified.

(6) United's sales and services within the Victoria and New Orleans Divisions should be continued on an emergency basis pending further order of the Commission in the remanded proceedings.

The Commission orders:

(A) The proceeding in Docket No. CP71-89 is hereby remanded to the Presiding Examiner for receipt of additional evidence to overcome the deficiencies hereinbefore specified.

(B) Within 45 days after issuance of this order United shall file with the Commission and serve upon the Presiding Examiner, all parties to the proceeding, and the Commission's staff the testimony and exhibits required to satisfy the evidentiary deficiencies hereinbefore specified.

(C) Within 30 days after the filing and service of United's evidence all other parties and the Commission's staff shall file with the Commission and serve upon the Presiding Examiner, United, and other participants any evidence which they may wish to present in support of their positions.

(D) Service to all customers in the Victoria and New Orleans Divisions shall be continued on an emergency basis, on condition that United's facilities therein be operated as part of its integrated interstate system, subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in this proceeding.

(E) The hearing in the remanded proceeding shall commence on April 25, 1972, at 10:00 a.m. (EST) in one of the Commission's hearing rooms, 441 G Street, N.W., Washington, D.C. 20426.

(F) The motions for oral argument made herein are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

Kenneth F. Plumb
Secretary.

(SEAL)

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

(Issued February 9, 1972)

CARVER, Commissioner, *dissenting*:

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Naturtl Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-

East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas suppliers were plentiful and pipeline capacity needed markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is that fact that within the same month this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, —— FPC —— (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack

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[1] Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2] The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: ". . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia* v. *Carroll, et al.* (1950) 338 U.S. 586, 600-602.

of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

The preceding observations are merely descriptive of the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light* v. *United Gas Pipe Line Company*, cited par. 75, majority opinion *supra*, constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata*, estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present: The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commissioner* v. *Sunnen*, 333 U.S. 598 (1948). (This case is not

the same as *FPC* v. *Amerada Petroleum Corp., et al.*, 379 U.S. 687 (1965), because it was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment," *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA3, 1951), cert. den. *sub. nom. Chenery Corp. et al.* v. *SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits, *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938),

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[3] In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

and enforces repose "not only as respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final, *U.S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private law suit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR.
Commissioner

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

OPINION NO. 610-A
Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

(Issued April 7, 1972)

NASSIKAS, Chairman:

1. A number of parties [1] have filed applications for rehearing of the Commission's Opinion No. 610 and order, issued February 9, 1972, wherein we found that this Commission has jurisdiction under the Natural Gas Act over the facilities, transportation and sales for resale of natural gas by United Gas Pipe Line Company (United) by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

2. Additionally, the State of Louisiana and the Louisiana Public Service Commission request an investigation

[1] New Orleans Public Service, Inc. and the City of New Orleans (jointly), Texas Gulf Sulphur Company, Boise Southern Company, Texas Gas Transmission Corporation, Louisiana Gas Service Company, Louisiana Power and Light Company, Gulf States Utilities Company, Cities Service Oil Company, Shell Oil Company, Humble Oil & Refining Company, Texaco Inc., and State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission (jointly).

of alleged violations of "the Natural Gas Act and of Gas Reserves" and move to stay Opinion No. 610 and the remanded proceedings.

3. The applications for rehearing challenge the Commission's assertion of jurisdiction on various grounds, all of which have been considered and treated by the Commission in Opinion No. 610. We do not believe that further discussion is necessary. There have been certain allegations of erroneous factual conclusions, however, to which further comment would be appropriate.

4. Several parties, whose arguments are directed to the Green System-East, contend the Commission erroneously concluded that gas from the Green System-East leaves the State of Louisiana. They argue that there is nothing in the record to show that gas actually flows out of the state and that annual flow diagrams filed as part of FPC Form 2 actually show flows at point "U" going to Baton Rouge. At paragraphs 37 and 38 of the Opinion, we stated that gas from the Green System-East enters the Green System-West, flows into the interstate pipeline of the Mid-Louisiana Gas Company at point "U" and thereafter appears to flow out of the state. In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows.

5. Texaco Inc., asserts that there is an error in paragraph 25 of the Opinion wherein the Commission described gas flows from the De Large Field. It contends that the Commission erred in concluding that gas entered the Green System-East from the De Large Field. The Commission does not so state in paragraph 25, nor is such a conclusion intended. Despite the fact that the De Large field gas does not enter the Green System-

East, interstate gas including deliveries from the De Large Field is used to serve the Dulac area. Texaco Inc. also notes that the Commission's opinion omits the fact that several small isolated sections of transmission facilities in the Green System-East do not receive commingled flows. This has no bearing on the Commission's general assertion of jurisdiction over the New Orleans Division and is a matter which will be considered at the time that particular facilities are before us for certification.

6. Boise Southern Company (Boise) alleges that Opinion No. 610 contains a substantial misstatement of fact relating to those facilities by means of which it receives its gas deliveries. It notes that, contrary to the Commission's statement in paragraph 12 of the Opinion, the interconnection at point "A" has been certificated by the Commission [2] as was a 12-inch line which interconnected with Texas Eastern's 30-inch line. The only other transmission line used to serve Boise is 6.1 miles of 8-inch line. Boise argues that any assertion of jurisdiction over the 8-inch line should have been made at the time of certification in Docket No. CP67-26, and that in the absence thereof it had the right to understand that no further authorization from the Commission would be required. A review of the Commission's order in Docket No. CP67-26 indicates that certain facilities at point "A" were certificated by the Commission. This factual clarification, however, does not give substance to Boise's argument. The fact that additional facilities utilized to serve Boise were not certificated previously does not exempt United's facilities serving Boise from our assertion of jurisdiction.

7. Texas Gas Transmission Corporation's application for rehearing is directed solely to the Commission's order

[2] Commission order issued on July 22, 1969, in Docket No. CP67-26 (42 FPC 157).

that deliveries by United be continued on a emergency basis pending the conclusion of the remanded proceedings. It urges the Commission to impose interim volumetric limitations on United's customers affected by this case at the levels which correspond to the maximum takes of such customers in the past as reflected in the record. The issue of volumetric limitations upon certification is one that is to be taken up in the remanded proceedings as we believe the record evidence thereon is presently insufficient. In the interim we have provided that such deliveries shall be subject to curtailment in the same manner as United's other customers.

8. Texas Gulf Sulphur Company, which was granted late intervention by Commission order, issued March 31, 1972, asserts that the Commission was in error in not ordering United to cease further violations of the Natural Gas Act. It further contends that the Commission erred in ordering United to amend in any way its direct sales contracts or to make its direct sales subject to United's FPC Gas Tariff without the consent of its direct customers to the application of such tariff provisions or to any changes therein. Contrary to Texas Gulf Sulphur's assertion the Commission has not ordered United to amend its direct sale contracts. In authorizing United to continue its deliveries on an emergency basis we have, however, imposed certain conditions which we believe are in the public interest.

9. The State of Louisiana and the Louisiana Public Service Commission request an investigation of violations of the Natural Gas Act and of gas reserves alleging that there has been a "deliberate, extensive and wilfull violation by United of the prohibition of Section 7(e) of the Natural Gas Act against any proposed construction of extension of facilities which shall constitute the transportation or sale of natural gas subject to the jurisdiction of the FPC without first obtaining a certificate of

public convenience and necessity authorizing such acts or operations." This allegation appears to us to be inconsistent with the position taken by these parties that the Commission does not have jurisdiction over the facilities in question. Nevertheless, in finding the New Orleans Division jurisdictional on the basis of unauthorized gas flows, we stated that the Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. We refrained, however, from issuing a certificate of public convenience and necessity for any of the facilities, sales or services as we found that the record requires amplification. Among the matters to be addressed in the remanded proceedings would be the justification for United's initiation of flows into the New Orleans Division, as well as the requirements of the New Orleans Division for United's interstate flows. The latter would, of course, require a review of gas reserves within the New Orleans Division. Thus, we believe that the remanded proceedings will permit a resolution of these issues. Accordingly, we shall deny the State of Louisiana and the Public Service Commission's petition.

10. The State of Louisiana and the Louisiana Public Service Commission while expressing opposition to the reopening of the record, alternatively request that the record be broadened to include certain information specified in Appendix A of Special Order No. 7/71 of the Louisiana Public Service Commission, issued February 28, 1971. In the remanded proceedings the parties will have an opportunity to present evidence bearing on all issues related to certification. Requests for data may be directed to the Presiding Examiner. As for the motion for stay we do not believe that it would serve the public interest to stay our order and delay the remanded proceedings.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 610 and accompanying Order except as that Opinion is clarified above.

The Commission orders:

(A) The applications for rehearing of the Commission's Opinion No. 610 and order, described herein are denied.

(B) The petition for an investigation of violations of the Natural Gas Act and gas reserves and the motion for stay filed by the State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended.

[SEAL]

KENNETH F. PLUMB
Secretary

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

(Issued April 7, 1972)

CARVER, Commissioner, *dissenting*:

My dissent to Opinion No. 610 was broadly stated as embracing a wide array of legal, policy, and procedural differences with the conclusions of the majority, but refrained from any extensive analysis of those issues because the *res judicata* question seemed so clearly dispositive of the proceeding at that time. I remain of that opinion, but feel compelled to comment briefly on two of the substantive matters raised by certain of the parties in their applications for rehearing and not satisfactorily resolved in this order.

A critical element of the jurisdictional finding is the conclusion that gas flows into *and out of* United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the document or other factual source is clear on its face.

That is not the case here; the conclusions drawn by the majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should not be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U.S. Code)[1] and its judicial antecedents.

Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-Louisiana (point "U") "*appears*" to flow out of the state. This is indeed a flimsy predicate for an

[1] ". . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence. . ."

action having the drastic consequences referred to in my original dissent. Nor is it clear how gas entering Mid-Louisiana facilities at or near the Baton Rouge city gate can leave the State. As Texaco's application for rehearing states, Mid-Louisiana's line from the Monroe Field extends in a southerly direction and terminates at Baton Rouge. Its function is to carry gas across a corner of Mississippi back into Louisiana. Gas entering that line at point "U" goes only into Baton Rouge and is consumed there.

Until this proceeding at least, the *Florida Parishes* case represented a high water mark in the use of the commingling theory as a jurisdictional rationale. In its very first paragraph, Opinion No. 610 lays the foundation for the conclusion that that case is controlling here. This ignores a whole host of differences in the two situations, only one of which needs mention for present purposes. The question in *Florida Parishes* was whether intrastate sale of incidential amounts of gas taken from a transmission line which was an integral part of an interstate operation required our certification. Here, the facts are diametrically opposite: at most 3 or 4 percent of the volumes carried by an otherwise separate and distinct intrastate facility may have their origin in sources dedicated to the interstate market. To claim that a situation which was concerned with a 100 percent interstate supply source is identical or even comparable with one that is more than 96 percent intrastate is to reduce all problems and issues to the same dimensions. The public interest demands a better sense of perspective on the part of this Commission.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR.
Commissioner

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-874

NEW ORLEANS PUBLIC SERVICE INC., *Petitioner*

v.

FEDERAL POWER COMMISSION

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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IN THE

Supreme Court of the United States

October Term, 1973

No._____

NEW ORLEANS PUBLIC SERVICE INC., *Petitioner*

v.

FEDERAL POWER COMMISSION

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

New Orleans Public Service Inc. (NOPSI) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on June 28, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, at 1a) is not yet reported. The opinions and orders of the Federal Power Commission (Commission) are reported at 47 F.P.C. 245 and 47 F.P.C. 1021.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural

Gas Act, 15 U.S.C. 717 r(b). The order of the Court of Appeals denying rehearing (App. C, *infra*, p. 30a) was entered on September 5, 1973.

QUESTIONS PRESENTED

1. Whether Section 1(c) of the Natural Gas Act excludes from Commission jurisdiction the sales of gas by United Gas Pipe Line Company (United) to NOPSI for resale and the facilities used to make those sales.

2. Whether occasional and irregular movements of relatively small amounts of gas from interstate facilities into the Green System—East have converted the Green System—East into an interstate system in spite of the fact that the channel of the constant flow in the Green System—East is from Louisiana wells through intrastate facilities to consumers in Louisiana.

STATUTES INVOLVED

The statutes involved are Section 1(c) of the Natural Gas Act, 15 U.S.C. 717(c), and Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b).

STATEMENT

NOPSI is the local distributor of natural gas in the City of New Orleans. For many years it has purchased all of its requirements of natural gas from United. All of the gas received by NOPSI comes from the "Green System—East," which is a local pipe line system used by United for the sole purpose of delivering gas in United's New Orleans District. All gas which enters the Green System—East is consumed within the State of Louisiana. Under Louisiana statutes the Louisiana Public Service Commis-

sion has regulated United's sales for resale on the Green System—East and the transportation of gas to local gas distribution systems.[1]

All of the gas which goes into the Green System—East is produced in Louisiana. United also operates interstate pipe lines which transport Louisiana gas to other states. There are several points of connection between United's interstate pipe line facilities and the Green System—East and United can move gas from interstate facilities into the Green System—East by opening valves at these points. Gas cannot move from the Green System—East into the interstate lines because the pressure in the Green System—East is lower than that in the interstate lines. During the past few years United has, from time to time, opened the valve at two of these points of connection. This was done without the knowledge of the Commission or the customers and the amount of gas so injected into the local facility was a small percent of the requirements of that facility.

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1. The Louisiana statutes (LSA-R.S. 45: 301-302) provide that: "301. The transportation or sale of natural gas by pipe lines to local distributing systems for resale is affected with a public interest and such pipe lines, appurtenances and facilities to the extent of such transportation or sales are public utilities subject to the jurisdiction of the Louisiana Public Service Commission. "302. The Commission shall supervise, govern, regulate and control the transportation or sale of natural gas moving by pipe line to local distributing systems for resale for the purpose of fixing and regulating the rates charged and the service furnished by such public utilities in connection with such transportation or sale.

"The power, authority and duties of the Commission shall affect and include all matters and things directly connected with, concerning and growing out of the service given or rendered by such pipe lines transporting or selling natural gas to local distributing systems for resale with respect to any such transportation or sales."

A. *Proceedings Before the Commission*

In October, 1970, United applied to the Commission for a certificate of public convenience and necessity covering, among other facilities and sales, the Green System—East and the sales for resale to NOPSI. In February, 1972, the Commission issued its opinion and order, holding that

> (1) jurisdiction over the Green System—East and the sales for resale to NOPSI vested immediately in the Commission when United first injected gas from an interstate facility into the Green System—East;[2]
>
> (2) Section 1(c) of the Natural Gas Act does not exempt these facilities and sales for resale because
>
> > (a) the Louisiana Commission does not regulate direct sales and,
> >
> > (b) since United owns the interstate facilities as well as the Green System—East, the gas is not received from "another person" at the point where it enters the Green System—East.[3]

B. *The Decision of the Court of Appeals*

The Court of Appeals affirmed the Commission's holding that United's injection of gas from interstate facilities into the Green System—East had conferred jurisdiction upon the Commission.[4] On the ground that Section 1(c)

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2. 47 F.P.C. 262.
3. 47 F.P.C. 260-261.
4. ~~[Opinion, p. 19a]~~. App. A, p 19a

of the Natural Gas Act is not applicable to a local branch of an interstate pipe line system, the court held that Section 1(c) did not exempt the Green System—East and the sales for resale to NOPSI. The court construed Section 1(c) to mean that it does not apply unless the operator of the interstate facilities is a different person from the operator of the local system to which the interstate facilities connect.[5]

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. The Court of Appeals held that Section 1(c) of the Natural Gas Act, sometimes called the "Hinshaw Amendment," is not applicable to a local branch of an interstate pipe line system. Section 1(c) was enacted by Congress in 1954 as the result of this Court's decision in *F.P.C. v. East Ohio Gas Company*, 338 U.S. 464 (1950).[6] The Hinshaw Amendment, which has not been construed by this Court, reads as follows:

> "(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce

5. ~~[Opinion, p. 19a]~~ App. A, p. 25a

6. "The difficulty giving rise to the need for this bill is that under certain interpretations of the Federal Power Commission, principally the interpretation upheld by the Supreme Court in the *East Ohio* case (see the appendix for the text of this case), the Commission has undertaken regulation of some activities of certain companies engaged in the distribution of natural gas whose operations take place wholly within a single State and which can be completely regulated by the respective States. * * * This bill eliminates this duplication by leaving the jurisdiction over these companies exclusively in the States, as always had been intended." "Amending the Natural Gas Act," H. Rep. No. 899, 83d Cong., 1st Sess., p. 2.
Co., 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950).

> or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and services of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 State. 36."

1. All gas sold by United to NOPSI is received by United from another person within the State of Louisiana; this gas is purchased by United from producers. All gas transported by United in the Green System—East is consumed within the State of Louisiana. Insofar as United's sales for resale to NOPSI are concerned, United's rates, service and facilities are subject to regulation by the Louisiana Public Service Commission, which filed with the Commission a certification that it has jurisdiction over these rates and service and facilities and is exercising that jurisdiction.

2. Many local branches of interstate pipe line systems are operating under Hinshaw exemptions. East Ohio Gas Company, whose operations the Hinshaw Amendment was designed to exempt, was the Ohio branch of

Hope Natural Gas Company. United has a Hinshaw exemption for one local branch in Louisiana.[7] The Commission has recognized that Congress did not intend to require separate incorporation of a local branch in order to qualify for an exemption.

> "Indeed, one of the very objects of the Hinshaw amendment was to obviate the need for natural gas companies to engage in corporate legerdemain in order to avoid Federal Power Commission jurisdiction over local facilities and operations."[8]

3. Before its decision in the present case, the Commission consistently construed the Hinshaw amendment as being applicable to a local branch of an interstate pipe line system.[9] The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.[10] There are no such "compelling indications" in the present case.

4. The Commission's jurisdiction over United's interstate sales for resale and the interstate facilities used to make those sales would not be affected by exemption of the sales for resale to NOPSI and the Green System—East under the Hinshaw amendment. The Commission would continue to have jurisdiction to curtail deliveries of

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7. United Gas Pipe Line Company, 35 F.P.C. 172 (1966).

8. Utah Gas Service Company, 39 F.P.C. 388-389 (1968).

9. United Gas Pipe Line Company, 35 F.P.C. 172 (1966), Pennzoil Pipeline Company, 44 F.P.C. 291 (1970), United Gas Pipe Line Company, 44 F.P.C. 292 (1970), Mountain Gas Company and Cabot Corporation, 42 F.P.C. 305 (1969), Columbia Gas of West Virginia, Inc., 44 F.P.C. 1260 (1970), Michigan Consolidated Gas Company, 46 F.P.C. 658 (1971).

10. Red Lion Broadcasting Company v. Federal Communications Commission, 395 U.S. 367, 381 (1969), Zemel v. Rusk, 381 U.S. 1, 11-12 (1965).

gas from interstate sources to the Green System—East. A Hinshaw exemption in this case would mean only that federal regulation would not be substituted for state regulation as to the Green System—East and sales therefrom to NOPSI for resale.

5. Under the decisions of this Court the existence of federal jurisdiction is determined by the channel of the constant flow, a matter to be discovered by examining the anatomy of the pipe line system.[11] The channel of the constant flow of gas into the Green System—East is from wells in Louisiana to consumers in Louisiana. Movement of gas from interstate facilities into the Green System—East is occasional and irregular and represents only a small percentage of the requirements of the System. The channel of the constant flow is an intrastate and not an interstate channel.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner
New Orleans Public Service Inc.

11. California v. Lo-Vaca Gathering Company, 379 U.S. 357, 359-360 (1965).

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos.
72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC., and CITIES SERVICE OIL COMPANY, ET AL.,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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(June 28, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This case is another in the long-running and seemingly endless saga of "Who

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Gets The Gas?", starring the major oil companies, the natural gas pipelines, major industrial users of natural gas, and the Federal Power Commission. Also featured, albeit in somewhat of a bit part, is the individual gas consumer, "the little lady at the burner tip". Although possibly suited for short subject treatment, this proceeding has now become a full-length feature of epic proportions. Basically it is this court's task to consider petitions for review of FPC Opinions 610 and 610-A, in which the Commission took jurisdiction over a formerly intrastate pipeline in Eastern Louisiana. There are many parties with numerous underlying themes to present. From this confusion we must review whether or not the FPC correctly handed out the awards.

In Opinion 610, the FPC found that due to the injection of interstate gas, the formerly intrastate pipeline known as the "Green System-East" was now subject to FPC jurisdiction. Despite all the many different methods used by the petitioners in stating the issues, there are basically only two points for us to consider in reviewing the Commission: (1) Was the FPC correct in holding that the Green System-East had become sufficiently interstate to confer exclusive federal jurisdiction? (2) Even if the system would be otherwise an interstate pipeline subject to jurisdiction, had Congress expressly withdrawn federal jurisdiction for a pipeline such as this by enactment of the Hinshaw Amendment to the Natural Gas Act?

Also, in Opinion 610, the FPC found federal jurisdiction over United's Purple System, another formerly

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intrastate pipeline. While the majority of the petitioners challenge only the existence of federal jurisdiction over the Green System, two petitioners, Cities Service and Gulf States Utilities, challenge the characterization of the Purple System as interstate. The nature of each of these pipelines will be considered separately below.

The Green System-East

The Green System-East, a natural gas pipeline owned by United Gas Pipe Line Company, is physically situated entirely within the State of Louisiana in United's New Orleans division. For several years prior to October 1, 1970, when United filed an application for FPC certification for the Green System-East, these facilities had been operated as an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. At this point it is necessary to note that the Green System-East is connected through systems of valves with other pipelines, including United's Black System which is an interstate pipeline. It appears that all the gas which goes into the Green System-East is produced in Louisiana gas fields, although at some point some of this gas may be carried in pipelines which also carry gas dedicated to the interstate market. There exists a heated debate as to whether any gas once placed in the Green System-East can or does ever leave the State of Louisiana. These factual matters are basic to the holding of jurisdiction and will be considered in detail *infra*.

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Prior Proceedings

The Green System-East has been involved in a significant chain of court opinions. Petitioner, Louisiana Power

& Light, previously brought suit in the United States District Court for the Western District of Louisiana seeking a determination of the intrastate character of the Green System-East. The district court, 332 F.Supp. 692 (1971), dismissed the suit, holding that the issue of the nature of the Green System-East was within the primary jurisdiction of the FPC.

On appeal, we reversed the district court, disagreeing that it was necessary to await Commission action. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326. This court went on to address the issue of the Green System-East's interstate character and held that any interstate gas which had been introduced into the system was so minimal in amount that federal jurisdiction had not attached.

In *Federal Power Commission v. Louisiana Power & Light Co.*, ____U.S.____, 32 L.Ed.2d 369 (1972), the Supreme Court reversed this court and agreed with the result reached by the district court. Noting that the FPC was conducting hearings of its own in this regard, the Court held that while the agency's decision would not be the last word, it must be the first. The FPC has now reached its decision, finding that the Green System-East is sufficiently interstate to be jurisdictional. It is that "first word" of the agency which we now must review and issue, if not the last word, at least the "next word".

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I.

Before proceeding to the merits of the controversy, it is helpful to have a firm picture of the various parties engaged in this litigation and their respective interests in

its outcome. It is also important to understand the practical effect of FPC jurisdiction on the parties.

The petitioners can be divided into basic groups. The major oil companies have an interest in the outcome both as sellers and purchasers of natural gas. Several smaller distribution companies which purchase gas from United and the Green System are also challenging the Commission decision. Of course, the petitioners include several state regulatory agencies charged with the duty of regulating pipelines which are intrastate in nature. Public utilities which purchase natural gas for resale are involved as parties, as are various towns, parishes and municipalities, both as gas purchasers and representing the public interest. Basically, the effect of federal jurisdiction over the Green System-East will have a similar effect on each of these parties, although not to the same degree.

The petitioners, quite naturally, paint themselves as the heroes of this piece, denominating United as the villain and the FPC as conspirational bedfellow or, at the least, stooge of United. In giving depth to this characterization of United, the petitioners seek to show United as a greedy, over-reaching and somewhat callous corporate giant out to gorge itself at everyone's expense. The accuracy of this picture, they say,

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is made crystal clear by the results which will flow from FPC jurisdiction in this case.

These horrors which petitioners feel will flow from FPC jurisdiction are basically twofold. First, the switch from Louisiana Public Service Commission regulation,

which, with regard to direct sales is virtually non-regulation, to FPC regulation will permit United to abrogate numerous long-term contracts which it has entered in the past for deliveries of gas to gas purchasers. The importance of this benefit can be seen immediately. Many of these contracts have several years yet to run. They were negotiated in the days when the supplies of natural gas appeared to be endless and, thus, contracts for extremely long terms, such as 20 years, were considered good business, sewing up a customer for the future. Of course, as we all know, with the rise of environmentalism which stressed the importance of natural gas as an essentially "clean" fuel and the realization that natural gas reserves and availability have been drastically overestimated, this country has been plunged into an "energy crisis". This "crisis" seems especially acute in the natural gas industry, possibly because of the greater demands for the fuel. Thus, what gas is available can be sold and indeed will be sold for substantially higher prices on today's market than a pipeline could realize under the old long-term contracts entered years ago. Even regulated prices would be substantially higher than the old contract rates, and it must be remembered that the FPC does not regulate the price of sales to direct customers such as large industries but only sales where ultimately the gas will be resold.

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Secondly, the gas shortage has led to the necessary allocation of priorities and rationing of this limited supply of natural gas. Through what is popularly called "curtailment", pipelines are allowed to file, subject to

Commission approval, plans of allocation of the available gas, basically to ensure that gas goes not to the highest bidder but to those who need it most in the public interest. FPC jurisdiction, thus, also brings in the almost certain result of curtailment of deliveries, even contractually agreed to deliveries. See *International Paper Co. v. Federal Power Commission,* 5 Cir. 1973, ____ F.2d ____ [No. 71-3531, slip opinion dated February 7, 1973].

The parties who sell gas to United for the Green System-East are also worried that if the Green System-East is held interstate they will be in a difficult contractual situation because the gas they are using to fill United's needs is restricted in many cases to the intrastate market only by contracts with those having the gas rights. Thus, they fear that they will have to use other gas to service the Green System-East.

Viewing this situation, the petitioners present United as out after the "fast buck". They allege that United was perfectly willing to be regulated, or in some cases not regulated, by the Louisiana Public Service Commission until it became evident to United that it was to its distinct financial advantage to come under FPC jurisdiction. They further suggest that to obtain Commission jurisdiction, United improperly and perhaps illegally injected interstate gas into the Green System-East, as it could do because of the interconnecting val-

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ves, solely for the purpose of creating an argument for jurisdiction to present to the Commission.

United, for its part, seeks to reverse these roles and cast itself as the "good guy". United presents a picture of

greedy private industries wishing to gobble up all available gas for their own selfish use, to the detriment of other consumers and the public in general. United claims that any diversion of interstate gas into the Green System-East was because it was absolutely necessary to meet contract deliveries. United supports the Commission finding as in the best interest of the consuming public. Agreeing with United on this point, at least as far as its consumers go, is the Public Service Commission for the State of New York. New York intervened, alleging its fear that United would divert substantial amounts of gas dedicated to the interstate market, including New York consumers, to fill these Green System-East contracts unless the federal authorities exercised control.

Thus, the battle line is drawn and, as usual, the dispute is not over gas alone, but also money. In reviewing the Commission's opinion, we must put away these self-serving charges and countercharges and look to the legal issues of the requisites for federal jurisdiction. In light of the Supreme Court's directive in *Louisiana Power & Light Co.*, supra, our task must begin with the FPC's decision.

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II.

Opinions 610 and 610-A

The first question which the FPC faced in entertaining United's request was whether or not the Green System-East was indeed a jurisdictional pipeline. Noting that none of the interconnections at which United alleged interstate gas to have flowed into the Green System had been certificated by the Commission, the FPC stated that

"the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the . . . facilities". In is presentation, United had marked a map of its system showing the points at which interstate gas had been injected into the Green System. The amounts of gas injected at each of these points, as found by the Commission, are set out in the margin.[1] Having

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1. (b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

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found that gas which ultimately found its way into the Green System had at one time been transported in a pipeline which carried interstate gas even though all the gas was produced within Louisiana and had never physically been outside the state,[2] the Commis-

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sion went ahead to decide whether or not the amount gave it jurisdiction.

The Commission found that the amounts involved were substantial and were sufficient to give the Commission jurisdiction. On peak days for 1970 and 1971 which were chosen, the Commission figures showed that 153,376 Mcf and 189,846 Mcf, respectively, flowed into the Green System-East. The Commission rejected a *de minimis* argument made by several of the petitioners stating that the interstate portion of the gas

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24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

2. This is in dispute, but it is clear that some gas once carried in the Green System-East ends up in an *interstate* pipeline owned by Mid-Louisiana, but in all probability this gas does not physically leave Louisiana.

on peak days represented 7.79 percent of the requirements and on an annual basis, 2.39 percent of the requirement.[3] Several of the parties dispute these findings made by the Commission, especially the holding as to the total amount introduced into the Green System-East. We will discuss these points in more detail later in the opinion.

Viewing the total picture presented by all the various factors in the record before it, the FPC found that the Green System was an integrated part of United's interstate (or Black) system and that the Green System-East could no longer be left to state regulation as a purely intrastate pipeline. We note that the Commission somewhat retreated from its suggestion that Green-System gas flowed out of the State of Louisiana in a physical form. In Opinion 610-A, the FPC stresses that its finding that Green System gas is introduced

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into mid-Louisiana's pipeline is simply to show that it is commingled with gas which has moved in interstate commerce. This factor, according to the FPC, gives support to its holding that the Green System has become integrated with interstate systems even though the gas itself never flows out of the state.

The FPC went on to hold that jurisdiction was not to be determined by the amounts of gas involved. They held that jurisdiction attached wherever even an infinitesimal amount of interstate gas was injected into the system. For these purposes, the Commission de-

3. Adjustments raise these figures to 10.7% and about 3.4%, respectively.

fines interstate gas as any gas which had ever been carried in a certificated interstate pipeline.

Section 1(c) of the Natural Gas Act, commonly known as the Hinshaw Amendment, provides an exemption from federal regulation wherever all the gas received by the system is to be consumed wholly within the state. The Commission refused to apply the Hinshaw exception, apparently finding that the Green System-East was an integrated facility and part of United's total system.

Relying on *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), and this court's Florida Parishes opinion, *Louisiana Public Service Commission v. F.P.C.*, 5 Cir. 1966, 359 F.2d 525, the FPC held that there had been sufficient commingling of intrastate and interstate gas to require that the Commission take jurisdiction over the Green System-East. The Commission also expressly rejected the argument that United had illegally and improperly introduced interstate gas into

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the Green System-East. First, it found the amounts injected were necessary to meet contract commitments, but, more importantly, stated the existence of jurisdictional facts controlled no matter what the motive.

Commissioner Carver dissented from Opinion 610. His primary reason for dissenting was his feeling that this circuit's opinion in *Louisiana Power & Light v. United Gas Pipe Line Co.*, 456 F.2d 326, which had not yet passed on by the Supreme Court, was controlling and that the Commission was bound by *res judicata*. In his remarks, Commissioner Carver criticized the

Commission for failure to take account of what he felt were the obvious reasons that United was now seeking Commission jurisdiction. He pointed out that the long-term industrial contracts were no longer beneficial to United because of the low rate structure and impending supply crisis. He also referred to the protected curtailment that United had previously sought from the Commission. See *International Paper Company v. FPC*, 5 Cir. 1973, ____F.2d____, [No. 71-3531, slip opinion dated February 7, 1973]. He further stated:

> Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands.

Following the petitions for rehearing, the Commission issued Opinion 610-A. In this opinion, the Commission retreated somewhat from its conclusion that Green System-East gas flowed out of the State of Lou-

isiana. The Commission also attempted to clear up several other statements in Opinion 610 which were questionable. Commissioner Carver again dissented. He points out that the retreat as to Green System-East gas flowing out of the State of Louisiana undermined the entire finding of jurisdiction. Furthermore, he objected to the majority's use of "official notice" in considering flow charts not made a part of the record in the case without giving the parties an opportunity to present analysis of those flow diagrams. Commissioner Carver concludes that the interstate gas which does flow into the Green System-East is so minimal and insignificant that the Commission should not take jurisdiction.

III.

At the outset, we note that the FPC has apparently decided to treat the entire Green System, formerly known as Green System-East and Green System-West, as a single unit for purposes of determining the existence of federal jurisdiction. In the past the Green System-East has been that part of United's New Orleans division facilities lying east of United's Napoleonville-Kosciusko interstate pipeline system. There is no abrupt stopping point for Green System gas when it reaches the Napoleonville-Kosciusko line; it simply continues to flow on toward the Baton Rouge area, but with the pipe denominated the Green System-West. Apparently this artificial division has been allowed to exist unchallenged for a number of years. In the past this one continuous pipeline has apparently been treated, for certification purposes, as two separate entities.

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The Green System-West has long been certificated while the Green System-East has been considered totally intrastate. As Commissioner Carver points out in his dissent to Opinion 610:

> However, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit, free of Federal regulatory impact, and free

> to contract in any manner it chose, consistent with State law.

In Opinion 610, however, the FPC indicates that at this time the whole New Orleans facility, the entire Green System, must be considered as a unit.

The FPC, in finding jurisdiction, relies heavily on the fact that gas which must be denominated interstate gas flows into and out of the Green System. The flow charts used by the Commission for the year 1969 show that 5,419,519 Mcf of gas were supplied from interstate lines into the Green System-East, that part of the Green System east of the Napoleonville-Kosciusko line. Aside from a minuscule and irregular injection of less than 14,000 Mcf at Point "K", this entire volume

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of gas was injected at Points "I" and "J". The FPC found that this gas was interstate in nature because it was taken from a commingled stream of gas designated for the interstate market. Both Points "J" and "I" present similar factual situations since they both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading to United's interstate system, the other into the Green System-East.

The Commission also held that substantial quantities of interstate gas were delivered into the Green System at Points "L" and "M", which are both located west of the Napoleonville-Kosciusko line in the Green System-West. At Point "L" over 38,000,000 Mcf is delivered into what is known as the Willow Glen Loop. This loop is also supplied with almost 7,000,000 Mcf directly from the Green System-West and it should be noted that this exit for Green System gas is located very close to

the alleged breakpoint between the Green System-East and the Green System-West and that this injection of almost 7,000,000 Mcf is over three-fourths of the total volume which the so-called Green System-East delivers to the so-called Green System-West. At Point "M", the Napoleonville-Kosciusko line delivers approximately 2,-000,000 Mcf into the so-called Green System-West. This 2,000,000 Mcf joins with the almost 2,000,000 left after delivery to the Willow Glen Loop and, with various further receipts and deliveries in the so-called Green System-West, continues on to the end of that pipeline for exchange into the Mid-Louisiana's interstate pipeline for transportation and sale within the Baton Rouge area. It should be noted that the Mid-

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Louisiana line contains interstate gas flowing in from Mississippi.

Based on these injections and comminglings of interstate gas into and within the Green System, the Commission found that it had jurisdiction over the entire system. In its opinion, the FPC noted that, even without consideration of Points "L" and "M", after adjustments, about 3.4% of the Green System-East's annual requirements were supplied from these interstate gas sources. For the peak day of January 6, 1970, the adjusted figures did show that 10.7% of the flow into the Green System-East facilities was injected from interstate gas. The Commission expressly found that these quantities are not *de minimis*. The Commission expressly found that without these injections of interstate gas there would have been a serious deficiency to serve the New Orleans area. Furthermore, the Commission found

that this deficiency will seriously increase in the next few years, especially during the peak winter months, with the result that more and more interstate gas would have to be diverted to satisfy commitments. Thus, the Commission has explicitly held that the interstate injections are not minimal in amount nor are they of a temporary nature. Rather, the Commission feels that the amounts were significant, especially on peak days, and that continued delivery of interstate gas will be necessary to fill contractual obligations on the Green System-East.

Several, but not all, of the petitioners attack the Commission's use of a commingling theory based on *People of the State of California v. Lo-Vaca Gathering*

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Co., 379 U.S. 366 (1965); *FPC v. Amerada Petroleum Corporation*, 379 U.S. 687 (1965); and, most especially, our decision in *Louisiana Public Service Commission v. FPC*, 5 Cir. 1966, 359 F.2d 525 (commonly called Florida Parishes). In seeking to distinguish these cases the petitioners rely on this court's opinion in *Louisiana Power & Light Company v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326, in which we held that "the flow of gas from the Black System into the Green System in the case at bar is occasional and irregular as well as minimal". Id. at 339. The petitioners stress that our conclusion in that case was based on substantially the same evidence presented to the Commission and that we must now reach the same result.

As previously noted, the Supreme Court vacated that part of our opinion referred to above which held that there was no FPC jurisdiction over the Green System-East. 32 L.Ed.2d at 389. The Court held that the deter-

mination of jurisdiction was for the FPC in the first instance with our role limited to the normal processes of judicial review under the Natural Gas Act.

The Federal Power Commission was set up by Congress to bring a degree of regulatory expertise to the problems of regulating the transportation and consumption of natural gas, as well as other forms of energy. Because of their familiarity with the area in which they operate, the Commissioners are able to make substantially more accurate judgments than courts would be. Here the Commissioners have found that the injections of gas of an interstate character are not minimal and irregular, but are indeed sub-

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stantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments. Because of our prior holding, it is almost certain we would not reach the same conclusion as an initial matter. However, ours is not to substitute our judgment for that of the FPC on an issue where that body's intimate knowledge of the specific problems is concerned. We feel that determinations as to the amounts and constancy of the flow and their characterization in terms of impact and necessity therefor, once made by the Commission, cannot be lightly set aside by a court. In *Louisiana Power & Light* we were admonished by the Supreme Court to give the Commission the first chance to determine its jurisdiction in this case. The Commission has found that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. In making this latter determination, the Commission expressly considered and re-

jected the position of this court in *Louisiana Power & Light* as it applied to the facts found. Disagreeing with our holding that the injections were minimal, the FPC pointed out that the peak day injections were sufficient to heat over 100,000 homes. Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, Administrative Law Treatise §30.05.

Among other things, the Commission found that any amount of interstate gas would give jurisdiction. The opinion seems to suggest that one molecule would be sufficient to automatically confer federal control. We

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do not reach or consider that issue in this opinion. It appears to this court that there would clearly be times when the amounts of natural gas involved would be so irregular and minimal that Commission jurisdiction would be absurd. However, as noted, the Commission has found that such is not the case as to the Green System-East and we find that to reverse the Commission on this point would simply be substituting our own judgment for that of the Commissioners, a luxury that we do not possess under our limited review.

Thus, we find we must sanction those parts of the FPC's Opinions 610 and 610-A which establish federal jurisdiction over the Green System as an interstate pipeline. We are somewhat troubled by the assertion of Commissioner Carver and several of the petitioners concerning United's motive in obtaining FPC jurisdiction. However, we do not feel that we have any available way to step in and sort out the competing inequities and reach

what would be the fairest result for all concerned. That is the job for the Commission, and it is for the Commission to decide how to balance competing equities or how to penalize "unclean" parties in appropriate cases.

We would point out that federal regulation is not to be considered a plaything to be turned on and off to suit a pipeline's financial advantage. We feel confident that the FPC would not allow itself to be so used and are certain that courts would not allow such a practice to continue. Despite the innuendo and insinuation in this case, we see no direct evidence to support these suggestions of improper motive and conduct.

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IV.*

The Hinshaw Amendment

Section 1(c) of the Act (the "Hinshaw Amendment") describes certain persons and facilities whose participation in the transportation and sale of gas in interstate commerce is "primarily of local concern and subject to regulation by the several States". 15 U.S.C. § 717(c). Under § 1(c) these persons and facilities are exempt from the jurisdiction of the Commission.[4]

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* Judge Bell authored Part *IV, The Hinshaw Amendment,* for the court.

4. The text of the provision is the following:

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and

In the proceedings before the Commission the petitioners maintained that even if the gas transmitted through the Green System-East were interstate in character, the Commission would not have jurisdiction

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over it because the Green System-East falls within the provisions of § 1(c). The Commission held that the Green System-East is not an exempt facility within the meaning of that section. The petitioners contend this holding was erroneous. We disagree.

Congress enacted the "Hinshaw Amendment" to preserve state control over local distributors who purchase gas from interstate pipelines.[5] Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems.

We discern this intent in the legislative history. During the debate in both houses, supporters of the measure were at pains to emphasize that the proposed exemption was not for the benefit of interstate pipeline

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facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

5. The amendment was necessary because of an early decision of the Supreme Court which, in construing the scope of the Commission's jurisdiction over the transportation and sale of gas "in interstate commerce", held that interstate gas does not lose its interstate character in the hands of local distributors who buy gas for resale and ultimate consumption within the state. *FPC v. East Ohio Gas*

companies. See, e.g., 99 Cong. Rec. 10569-70 (remarks of Congressmen Hinshaw, Harris, and Yates). Critics of the measure suggested that the exemption would provide interstate pipelines with a means of defeating federal jurisdiction over portions of their operations which deliver gas for consumption wholly within a single state. One senator suggested that if an interstate pipeline placed one of its state-wide delivery systems under the control of a wholly owned subsidiary and

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delivered gas to the subsidiary at the state line, the local system would qualify for exemption under the terms of the bill. See 100 Cong. Rec. 3173 (remarks of Senator Burke). Senator Bricker, one of the sponsors of the bill in the Senate, vehemently denied this:

> "[T]here is no intent to place any pipeline company outside the jurisdiction of either the Interstate Commerce Commission or the Federal Power Commission.
>
> "As soon as such a pipeline company were formed, it would come within the jurisdiction of the Federal Power Commission.
>
> "This measure is not an effort—and I make this statement for the RECORD—to remove such companies from the jurisdiction of the Federal Power Commission. If such an interpretation is made, it is without basis or support or foundation upon anything stated at any of the committee hearings." *Id.*

The congressional intent not to exempt local segments of integrated interstate pipeline systems from regulation by the Commission finds clear expression in the language of the statute. Thus, under § 1(c) it

is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from

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"another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same "person".

In the present case we are not called upon to define with precision the degree of independence that must exist between the person who gives and the person who receives gas at or within state lines in cases where he exemption is warranted. Nor need we consider the propriety of the Commission's prior determinations with regard to the availability or non-availability of the exemption in other cases. Under any plausible reading of the "other person" requirement, the Commission's determination in this case must be sustained.

By virtue of the flow of interstate gas from the Black System into the Green, the Green System-East has ceased to be an intrastate facility and has become, instead, a local branch of an integrated interstate pipeline. In all its relevant parts, this pipeline system is operated by one person: United. A the points of connection between the Black System and the Green, United is the only person

who gives gas, and United is the only person who receives. At those points—the points at which the exemption must take effect, if at all—the "person-to-person" requirement simply is not met.

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Petitioners contend, however, that the requisite exchange from one person to another need not occur at the points where the exemption must take effect. They say that the person-to-person requirement may be satisfied by exchanges occurring at other points in the network of distribution or supply. Specifically, they claim that in this case the requirement may be satisfied by various exchanges that occur between the Black System and certain independent procedures "upstream" of the points of connection between the Black System and the Green, or by various exchanges between the Green System and certain independent interstate producers "downstream" of these points of connection.

The legislative history makes it clear, however, that in the contemplation of the supporters and the critics of § 1(c) the exchange between the two persons described in the statute took place at a point where an exemption was necessary to protect the receiver from federal jurisdiction that would otherwise exist under the *East Ohio* decision.[6] In other words, the point of the person-to-person exchange was a point where exemption was needed, and it was the point where the proposed exemption was to take effect. See the Senate and House debates, *supra*.

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6. See Footnote 5.

Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green

[26]

System-East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the point of connection between the Black System and the Green—the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

The logic of a technical requirement that identifies the point of exemption with the point of the requisite exchange is apparent on the facts of this case. The contributions by independent producers of intrastate gas downstream of the points of connection between the Black System and the Green, or the contributions of interstate gas upstream of these points, do nothing to change the fact that the Green System is now a local branch of an integrated interstate system. Given Congress' overriding intent not to bifurcate the regulation of such system, these contributions should not enhance the Green System's eligibility for exemption under § 1(c). Under our interpretation of the person-to-person requirement, they do not.[7]

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7. Because we decide the Hinshaw issue on this ground, we need not consider the other grounds asserted by the Commission as a basis for its refusal to recognize the allegedly exempt status of the Green System-East.

The Purple System

The "Purple System" is a pipeline system in United's Lafayette district in southwestern Louisiana.

[27]

This pipeline system, like the Green System-East, has long been considered an intrastate pipeline not subject to Commission jurisdiction. Two parties, Cities Service Oil Company and Gulf States Utilities Company, challenge the FPC's holding of federal jurisdiction over the Purple System.

The FPC, without dissent as to these facilities, made specific findings showing that the Purple System is unquestionably an integrated part of United's interstate system. At Point "A", United obtained gas for the Lafayette facilities by exchange with an interstate transmission line of Texas Eastern Transmission Corporation. At Point "B" on the system map, United obtained over 1,000,000 Mcf on an annual basis from an interstate line of Texas Gas Transmission Corporation. At Point "C" on the flow chart, United delivered, on an annual basis, over 24,000,000 Mcf to Penzoil Pipeline Company for transportation across the Louisiana line into Texas. At Point "D", United received over 1,000,000 Mcf from Tennessee Gas Pipeline Company's interstate pipeline. At Point "H", over 16,000,000 Mcf were supplied into two streams, with a little over one-half being delivered into one of United's interstate pipelines for transportation out of the state, and the remainder used in the intrastate system. Finally, at Point "O", Tennessee delivered over 22,000,000 Mcf on an annual basis to United's Purple facilities which were commingled with locally produced gas and used in the Lake Charles area.

[28]

These facts amply establish that the Purple System is an integrated pipeline facility with many connections and exchanges of gas with interstate facilities. Gas clearly flows out of this system for interstate markets at Point "C". Significant volumes of gas from interstate facilities are introduced into the Purple System for local sale.

Cities Service attempts to distinguish the *Amerada, Lo-Vaca* and *Florida Parishes* cases by stating that all the facilities used for transportation for delivery to Cities Service at its refinery are located in Louisiana and all of the gas used at the Cities Service plant originates at production points or exchange points within Louisiana. Cities Service alleges that this makes the pipeline system purely intrastate.

On the contrary, we feel the evidence clearly establishes that this Purple System is part of an integrated pipeline network involving significant transportation of interstate volumes. We feel that the *Amerada, Lo-Vaca* and *Florida Parishes* cases cannot be distinguished successfully. We will not "lop off" certain parts of the otherwise integrated system to create an artificial intrastate pipeline.

For the reasons set forth above, the result reached by the FPC in Opinions 610 and 610-A with regard to jurisdiction over the Green System and Purple System is

AFFIRMED.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185 and 72-2188

FPC No. CP 71-89

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC. and CITIES SERVICE OIL COMPANY, ET AL, Peitioners,
versus
FEDERAL POWER COMMISSION, Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Louisiana Power & Light Company and Texaco, Inc., and Cities Service Oil Company, Et Al for review of orders of the Federal Commission of the United States, and was argued by counsel;

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by his Court that the orders of the Federal Power Commission are hereby affirmed;

It is further ordered that petitioners pay to respondent-intervenor, United Gas Pipe Line Company the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1973

Issued as Mandate:

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC. and CITIES SERVICE OIL COMPANY, ET AL, Peitioners,

versus

FEDERAL POWER COMMISSION, Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion June 28, 1973, 5 Cir., ____ F.2d ____).

(September 5, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

SUPREME COURT, U. S.

Nos. 73-550, 73-867, 73-868, 73-871, 73-872, 73-874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

TEXASGULF INC.
LOUISIANA POWER & LIGHT COMPANY
LOUISIANA GAS SERVICE COMPANY
EXXON CORPORATION AND TEXACO INC.
STATE OF LOUISIANA, ET. AL.
NEW ORLEANS PUBLIC SERVICE INC.,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

BRIEF OF UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO MULTIPLE PETITIONS FOR WRIT OF CERTIORARI

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Nos. 73-550, 73-867, 73-868, 73-871, 73-872, 73-874

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v.

FEDERAL POWER COMMISSION,

Respondent

BRIEF OF UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO MULTIPLE PETITIONS FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 483 F.2d 623, *rehearing denied*, 483 F.2d 1404.

QUESTIONS PRESENTED

1. Is an interstate pipeline selling and transporting natural gas in interstate commerce within the meaning of Section 1(b) of the Natural Gas Act when the gas being sold and transported has been diverted from a commingled stream of gas destined in major part for out-of-state markets?

2. May the facilities used by an interstate pipeline for transportation or sale in interstate commerce of natural gas be exempted from Federal Power Commission jurisdiction by Section 1(c) of the Natural Gas Act (Hinshaw Amendment) when the *other-person* requirement is not met and the State Commission does not regulate direct-sale service?

STATEMENT

These cases involve the jurisdiction of the Federal Power Commission (Commission) over transportation and sale for resale of natural gas diverted from a commingled stream destined in major part for out-of-state markets. In a proceeding initiated by United Gas Pipe Line Company (United) (R. 1760-2047; A. 199)[1] in response to an inquiry from the Commission (Ref. Item B; R. 217, 219),[2] the Commission determined that it had jurisdiction over such transportation and sales. 47 F.P.C. 245. In a statutory review proceeding pursuant to Section 19(b) of the Natural Gas Act (the Act), 15 U.S.C. § 717r(b), the Court of Appeals, relying on the *Lo-Vaca*[3] and *Amerada*[4] decisions of this Court and its own *Florida Parishes*[5] decision, upheld Commission jurisdiction. 483 F.2d 623.

United, a natural gas company subject to the Commission's jurisdiction, operates interstate gas transmission

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[1] *R.* refers to the Certificate of Record in Lieu of Record filed by the Commission in the Court of Appeals. *A.* refers to the printed Joint Appendix prepared by the parties in connection with the review proceeding in the Court of Appeals.

[2] The dual references which follow United's citation of exhibits refer first to the page in the Certificate of Record in Lieu of Record where the exhibit was introduced and second to the page where the exhibit appears in the record.

[3] *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366.

[4] *FPC* v. *Amerada Petroleum Corp.*, 379 U.S. 687.

[5] *Louisiana Public Service Comm'n* v. *FPC*, 359 F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833.

facilities in Texas, Louisiana, Alabama, Mississippi and Florida (R. 1761-62), and, through connections with other major interstate gas transmission companies (R. 1762), supplies much of the gas used in the eastern half of the United States. The bulk of United's sales, service and facilities has long been regulated by the Commission. If the Commission's jurisdictional determination in Opinion 610 is upheld, all of United's sales, service and facilities will be regulated by the Commission.

The Louisiana facilities involved in this case are located entirely in southern Louisiana south of Marksville (Ex. 1; R. 107, 1319; A. 137)[6] in an area crisscrossed by United's main certificated interstate gas transmission facilities which are moving both onshore and offshore gas to markets outside Louisiana (R. 532-35). The disputed facilities[7] are not only contiguous to and interconnected with these main transmission lines (Ex. 1; R. 107, 1319; A. 137), but also

[6] Exhibit 1 is a system-wide map of United's natural gas properties which shows the relationship of the Louisiana facilities involved to United's certificated facilities. The facilities shown on Exhibit 1 are color coded in order to distinguish United's certificated facilities (shown in black) from United's other facilities in Louisiana (shown in purple and green). The facilities shown in purple serve an area denominated by United as its Lafayette District service area; the facilities shown in green serve an area denominated by United as its New Orleans District service area. The total area served by these Louisiana facilities (denominated by United as its New Orleans Division) is left unshaded on Exhibit 1.

[7] The eastern portion of United's New Orleans District facilities, arbitrarily named Green System-East or Green-East by some petitioners, are the only facilities whose interstate character remains in dispute. The remainder of the New Orleans District facilities (Green-West), the Lafayette District facilities and United's Victoria (Texas) facilities are all now conceded to be interstate. The only question which remains with respect to these latter facilities is the appropriateness of the Court of Appeals' refusal to Hinshaw the New Orleans and Lafayette facilities; no one has ever contended that the Victoria facilities could be Hinshawed.

are part of a fully integrated pipeline system by means of which United transports and sells gas from the states of Texas, Louisiana and Mississippi to industrial customers, pipelines and local distributors in these states and in Alabama and Florida (R. 88-89).

Some of the disputed facilities were covered by United's grandfather certificate issued in *United Gas Pipe Line Co.*, 3 F.P.C. 863, and from 1942 to 1954 these facilities were regulated by the Commission. For a period of time after 1954, pursuant to a settlement in one of United's rate cases, *United Gas Pipe Line Co.*, 13 F.P.C. 398, the Commission exercised no jurisdiction over the disputed facilities.

In 1965, because of a dwindling local supply and an escalating demand in the area served by the Louisiana facilities, interstate gas began flowing into those facilities (Ex. 30, R. 435, 1420; A. 194). As a result of continuing consultation between United and the Commission Staff which began shortly after *Florida Parishes* (R. 18), United undertook studies designed to determine whether the facilities being supported by these interstate flows were jurisdictional. The initial picture was confusing, and the substantial long-term dependency of the customers served by the Louisiana facilities was not immediately apparent. When, in 1970, United's studies revealed that customers served by these facilities were going to be substantially dependent on interstate gas for some time to come,[8] United filed an application (R. 1760-

[8] The uncertificated reserves dedicated to Green-East are rapidly declining and the Green-East demand is swiftly rising (Exhibit 3; R. 107, 1324-25; A. 142). By 1969 these trends had produced an annual deficit in Green-East of 5.4 million Mcf which was met by diversions of gas from interstate streams headed for out-of-state markets through Points I and J (Table, App. A, *infra*, at 17). For the year 1969, 2.69 percent of the 200.6 million Mcf demand in Green-East was met with interstate gas (Exhibit 3, at 2).

The deficiency is much greater on peak days. United estimated and the Commission found, 47 F.P.C. 245, 255, a 1971-72

2047; A. 199) requesting a certificate, pursuant to Section 7(c) of the Act, covering the sales, service and facilities involved.[9] Following the issuance of its customary notice (R. 2048-49), the Commission conducted exhaustive hearings (R. 1-1276) during which 63 Exhibits (R. 1319-1493) and 10 Items By Reference (R. 217, 1494-1759, 1796, 1830-2042) were received in evidence. Thereafter on July 2, 1971 the Commission, conscious of the interrelationship between this certificate proceeding and United's curtailment proceeding (R. 2447) and doubtless mindful of the collateral attack on its jurisdiction being pursued by LPL in the courts,[10] waived the intermediate decision of the examiner (R. 2446-50) and took the proceeding under advisement.

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peak-day New Orleans District demand of 1,002,000 Mcf and a local supply of only 413,000 Mcf, leaving 58.7 percent (589,000 Mcf) to come from interstate sources. United further estimated and the Commission found, 47 F.P.C. 245, 255-56, that 684,000 Mcf of the 1,018,000 Mcf demand for the 1972-73 peak day would have to come from interstate sources, leaving the New Orleans District dependent on interstate gas for 67.2 percent of peak-day requirements.

[9] The record does not contain a shred of evidence to support the innuendo that United filed the application in order to get out of improvident contracts. Because of the universally recognized gas shortage, the only gas available to meet the supply deficiency in Green-East is interstate gas; with interstate gas comes federal regulation including the requirement that United file a Section 7(c) certificate application if it wishes to continue the service. The requested certificates have been granted. *United Gas Pipe Line Co.*, Dkt. No. CP71-89 (FPC, July 20, 1973) (Opinion 661). Three proceedings to review Opinion 661 are pending in the Court of Appeals. *State of Louisiana, et al.* v. *FPC*, No. 73-1994 (D.C. Cir., filed Sept. 17, 1973); *Exxon Corporation* v. *FPC*, No. 73-2004 (D.C. Cir., filed Sept. 20, 1973); *International Paper Co.* v. *FPC*, No. 73-2146 (D.C. Cir., filed Nov. 7, 1973).

[10] On June 30, 1971 LPL filed notice of appeal from the judgment of the District Court dismissing its collateral injunction proceeding, *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 332 F.Supp. 692 (W.D. La. 1971), *rev'd*, 456 F.2d 326 (5th Cir. 1972), *rev'd sub nom.*, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, and moved to stay the judgment of the District Court.

On February 9, 1972, the Commission issued Opinion 610, 47 F.P.C. 245, finding that the sales, service and facilities involved are subject to Commission regulation because of interstate gas flows in the facilities, 47 F.P.C. 245, 249-63. The Commission determined that Section 1(c) did not affect its jurisdiction because the Louisiana Commission has no direct-sale curtailment (service) jurisdiction, 47 F.P.C. 245, 260-61, and the gas involved is not being purchased from another person but is simply flowing from one portion of United's system to another. 47 F.P.C. 245, 261.

On statutory review, the Court of Appeals affirmed, holding that the Commission's application of the commingling authorities to a fact situation involving diversions of gas into the facilities from a stream headed for out-of-state markets in volumes that are substantial, fairly constant, likely to continue, and necessary to meet demand in the Louisiana facilities, was supportable under the rational basis test as articulated by this Court in *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260. 483 F.2d 623, 630-32. The Court of Appeals also held that the facilities were not exempt from Commission jurisdiction under Section 1(c) as the *other-person* requirement was not met at the points of interconnection between United's certificated interstate facilities and the facilities petitioners claim are exempt. 483 F.2d 623, 633-34. Having thus disposed of the Hinshaw issue, the Court of Appeals did not consider the other grounds relied on by the Commission in declining to apply Section 1(c). 483 F.2d 623, 634 n.7.

SUMMARY OF REASONS FOR DENYING CERTIORARI

The arguments concerning the interstate character of the Green-East facilities are entirely factual in nature.[11] As the

[11] The argument of some petitioners about the flows at Points I

fact of commingling is established, [12] the legal result is controlled by *Lo-Vaca* and *Amerada*.[13]

The Hinshaw Amendment was carefully drawn to eliminate the duplicate regulation resulting from this Court's decision in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, without in any way diminishing the ability of the Commission to control interstate pipeline activities which cannot be effectively regulated by the State Commissions. The Court of Appeals' insistence that the gas involved be received from another person at the point of interconnection between United's certificated facilities and the facilities which petitioners seek to exempt insures that only companies *similarly situated*[14] to East Ohio will be exempted. As this reading of Hinshaw leaves United's substantial industrial volumes under Commission curtailment jurisdiction, thereby responding to the Congressional concern that activities affecting more than one state not be exempted, the result is clearly correct.

The complaint about Commission examination of the March 3, 1971 flow diagrams is frivolous as the diagrams that were in the record had not been challenged and the March 3, 1971 diagrams were inspected for the limited purpose of checking the accuracy of the diagrams that were in the record.

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and J, although primarily designed to demonstrate that the other person requirement has been met (note 20, *infra*, at 12), demonstrates the factual nature of the jurisdictional issue.

[12] Indeed, Texasgulf (Pet. 5) and Exxon/Texaco (Pet. 5) concede that commingling occurs.

[13] The possibility of a separate non-jurisdictional transaction reserved by this court in *Lo-Vaca*, 379 U.S. 366, 370, is not presented on this record. The argument here, as in *Amerada*, is whether the transactions are *in interstate commerce*, not whether the sales are resale or direct.

[14] Two petitioners (Exxon/Texaco Pet. 7 n.10) inadvertantly acknowledge that unless the activities of United are physically similar to those of East Ohio, an exemption would be improper.

REASONS FOR DENYING CERTIORARI

1. The jurisdictionality of the Green-East facilities turns solely upon an analysis of the operating facts in those facilities as the legal effect of commingling has been settled by *Lo-Vaca* and *Amerada*. This Court does not grant ". . . certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227.

Only three petitioners dispute the interstate character of the Green-East facilities. None disputes the following facts. At twelve of the twenty-four points of interconnection shown on Exhibit 1, substantial quantities of interstate gas flow into the uncertificated facilities (Tables, App. A and B, *infra*, at 17-18). A portion of these interstate gas deliveries are made to the Louisiana facilities from United's Lirette - Mobile and Napoleonville - Kosciusko interstate transmission lines carrying gas, produced both onshore and offshore Louisiana, to out-of-state markets (R. 532-34). Thus some of the gas moved in the Lirette-Mobile-Napoleonville-Kosciusko and other lines is sold in Louisiana for ultimate Louisiana consumption, and the balance is transported to other states for sale and consumption there (R. 85). The gas sold in Louisiana is intermixed during transportation with that sold in out-of-state markets (R. 85). The channel of constant flow in the lines from which gas is taken for Louisiana markets is out of state (Ex. Z-1; R. 2044-45).

Rather, petitioners attempt to distinguish the facts of this case from the *Lo-Vaca* and *Amerada* facts by arguing that the diverted gas (gas taken from the interstate stream) was produced, transported and consumed wholly within the State of Louisiana and that once diverted, the channel of constant flow of the gas in the Green-East facilities is local. Neither of these arguments has any jurisdictional signific-

ance. The gas involved in *Lo-Vaca* and *Amerada*, once diverted, may be described as produced, transported and consumed wholly within one state. Indeed one of the contracts involved in *Lo-Vaca* obligated the pipeline to use the gas it took as boiler and compressor fuel *in Texas*. 379 U.S. 366,368. Likewise, under the *Lo-Vaca* and *Amerada* facts one could find a channel of constant intrastate flow if one ignored the main-line flows.

2. The Court of Appeals' interpretation of the other-person requirement of the Hinshaw Amendment is correct; indeed any other resolution of the Hinshaw issue would seriously impair the Commission's ability to protect residential consumers dependent upon United by permitting LPL and other large industrial, boiler-fuel users[15] to escape Commission curtailment jurisdiction.

Those who argue for a Hinshaw exemption take one of two approaches. They either (1) contend that the person-to-person exchange need only take place within Louisiana (and thus, the Court of Appeals' requirement that the exchange take place at the point of interconnection is too restrictive) or (2) argue that the Commission has not insisted on the *other-person* requirement in other Hinshaw situations. Neither contention has any merit. [16]

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[15] *E.g.*, Texasgulf Inc. and NOPSI. NOPSI is also a gas distribution customer.

[16] The vague suggestions of some that the opinion of the Court of Appeals will jeopardize other Hinshaw exemptions, require duplication of facilities and hamper the ability of the industry to respond to the acknowledged nation-wide gas shortage are ill-founded. The eastern consumer interests, represented in the Court of Appeals by the Public Service Commission of the State of New York, fear no such consequences; the New York Commission supported Opinion 610, including the Hinshaw result.

The concern voiced by Exxon and Texaco that only gas distribution companies can be exempted under the Court of Appeals opinion is likewise without basis. The fact situations

In order to understand Hinshaw one must recall this Court's observation in *Illinois Natural Gas Co.* v. *Central Illinois Public Serv. Co.*, 314 U.S. 498, 506, that the Natural Gas Act was passed in order to regulate activities of the interstate pipelines which this Court had determined to be beyond the power of the states to regulate.[17] As the Gas Act jurisdiction was as broad as *interstate commerce*, this Court in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, found Commission jurisdiction under the Act to regulate activities of East Ohio which, under the earlier decisions, the Ohio Commission could regulate and was in fact regulating. Thus, as a result of *East Ohio Gas*, certain activities of interstate pipelines which had been and could be effectively regulated by the state commissions were now subject to regulation by both the state and the federal commissions. The legislative history makes clear that Hinshaw was an attempt to deal with this problem (duplicate regulation) without at the same time removing from federal regulation any of the activities which the states could not effectively regulate. In the FPC Report on H.R. 5976, the bill which ultimately became Section 1(c) of the act, the Commission stated:[18]

> The Supreme Court in F.P.C. v. East Ohio Gas Co. (338 U.S. 464, 70 S. Ct. 266 (1950)) held that the East Ohio Gas Co. was within the jurisdiction of the Commission under the Natural Gas Act, because its operations are in fact in interstate commerce. This bill would grant exemption to companies *similarly situated*

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of the cases they rely on (notes 24-25, *infra*) demonstrate that pipelines *which meet the Hinshaw test* have been and will be exempt.

[17] *E.g.*, *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298; *cf. Pub. Util. Comm'n of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83.

[18] FPC Rep. on H.R.5976, 83d Cong., 2d Sess. (1954); 1954 U.S. Cong. & Adm. News 2103, 2104.

and declare their operations within a single State to be primarily of local concern.

> The applicability of the Natural Gas Act to companies in the East Ohio Gas Co. category has resulted in some duplication of State and Federal regulation. While the examinations of the Commission do not show that the cost to individual companies of duplicative regulation has been excessive in direct outlays, nevertheless the elimination of any overlapping is desirable. No good purpose is seen for the imposition of federal regulation in addition to that provided under State laws *where only one State is affected*, and the futility of duplication was pointed out in our Opinion No. 216, July 17, 1951 (Texas Illinois Natural Gas Pipeline Co.). At that time we expressed the hope that Congress would see fit to enact remedial legislation *covering the East Ohio* situation. We repeat that hope. (Emphasis supplied.)

The Senate report on the same bill[19] included a portion of the preceding quotation and then stated:

> Specifically this legislation proposes to amend the Natural Gas Act by adding to section 1 a new subsection (c) providing, subject to certain specified conditions, that a company shall not be subject to the act by reason of the fact that it is engaged in the transportation, within a State of *out-of-State* natural gas received within or at the State border or by reason of the fact that it sells, either to local distributing companies or to companies for resale and ultimate consumption within that State, *out-of-State* natural gas received by it within or at the State border. . . . (Emphasis supplied.)

Congress responded to this dual concern by carefully tailoring an exemption of companies *similarly situated* to East Ohio. A brief comparison of East Ohio's situation with

[19] Sen. Rep. No. 817, 83d Cong., 2d Sess. (1954); 1954 U.S. Cong. & Adm. News 2101, 2102.

that of United convinces that Congress could not possibly have intended that Hinshaw apply to the situation presented on this record. In *East Ohio Gas*, East Ohio was at the other end of the interstate transmission network. It received gas (from jurisdictional pipelines like United) which had crossed into Ohio from other states and distributed that gas along with other gas in Ohio. As it made no sales for resale it contended that it was not a jurisdictional pipeline under Section 1(b). This Court held that it was because it was transporting gas in interstate commerce.

United, on the other hand, is at the base of a network of interstate transmission lines which serve the eastern half of the United States. The facilities sought to be exempted are being operated along with United's certificated facilities as an integrated pipeline system by means of which United conducts a multi-state gas transmission business. At the points of interconnection between United's certificated facilities and the facilities which petitioners claim are exempt, no gas is being received; rather gas which already belongs to United is simply flowing from one portion of United's system to another.[20]

In addition to being differently situated, United conducts operations in Louisiana which clearly *affect more than one state*.[21] Currently, United's deliveries to customers served by the Louisiana facilities are being made subject to United's curtailment plan filed with the Commission. 47 F.P.C. 245, 268. If the Louisiana facilities are Hinshawed, the Commission's curtailment authority over substantial industrial volumes will be destroyed, leaving a regulatory

[20] If one attempts to satisfy the person-to-person requirement by pointing to producer transfers or deliveries at the tailgate of processing plants, one cannot meet the requirement that all of the gas so received is then consumed within Louisiana.

[21] The Commission attached much importance to this factor at the time Hinshaw was being considered. Text, *supra*, at 11.

gap which the Louisiana Commission cannot fill. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621.

Nor can curtailment problems be solved by controlling deliveries at the point of interconnection between United's certificated facilities and the disputed facilities. As this Court recognized in *Louisiana Power*, 406 U.S. 621, 633 n.11, the Louisiana Commission has no jurisdiction over any aspect of direct sale *service*.[22] Thus, although the Commission might order United to deliver a certain quantity of gas into Green-East to meet human needs and other demands having a higher priority than LPL's boiler-fuel requirements, neither the Commission nor the Louisiana Commission could ensure that the gas so delivered ever reached those higher priority customers.[23]

---

[22] La. Const. Art. 6, § 4. No petitioner disputes the Commission's position, 47 F.P.C. 245, 260 n.10, that it received a disclaimer of direct sale jurisdiction from the Louisiana Commission.

[23] The disastrous impact of an exemption on the Commission's curtailment authority confirms the wisdom of the Commission's position, not reached by the Court of Appeals, 483 F.2d 623, 634 n. 7, that exemption would be improper because the Louisiana Commission has no jurisdiction over direct-sale service. This position is well grounded in legislative history. At 99 Cong. Rec. 10563, the following exchange occurred:

> Mr. Yates. Will the gentleman state whether the term "rates" as used there means all the rates of a company, including retail and wholesale rates or one or the other? Does it mean all types of *service*? Does it include the abandonment of *service*? What is the intent of the bill in that respect?
>
> Mr. Hinshaw. That was an amendment proposed by the Federal Power Commission and so far as I am able to determine, and I believe accurately, it includes all sales and *services*.
>
> Mr. Yates. Mr. Chairman, will the gentleman yield further?
>
> Mr. Hinshaw. I yield.
>
> Mr. Yates. In other words, what the gentleman has said is that in order for a company to be exempted from Federal regulation all of its rates and all of its *service* would have to be subject to the regulation of the State regulatory agency in order for that company to be exempt; is that correct?
>
> Mr. Hinshaw. In respect to natural gas, yes; that is my understanding. (Emphasis supplied.)

Those who contend that the Commission, in its administration of Hinshaw, has not insisted on the *other-person* requirement and has on previous occasions exempted portions of an integrated interstate system, rely on cases which simply do not support the contention. The Commission has never exempted a branch of an integrated pipeline system.[24] Nor has the Commission ever relaxed the requirement that the gas be received from another person.[25]

---

[24] The gas sold by United to the Town of Gueydan, *United Gas Pipe Line Co.*, 35 F.P.C. 172, is purchased from Transcontinental Gas Pipeline Corporation and delivered through a line which runs from Transco's facilities to the Town of Gueydan and nowhere else. As the Louisiana Commission regulates resale service, all of the Hinshaw requirements are met. The system involved in *Pennzoil Pipeline Co.*, 44 F.P.C. 291, was properly exempted as the *other-person* requirement is met and the Texas Commission regulates both resale and direct service.

Although it is not clear from the order referred to in the State's petition, *Columbia Gas of West Virginia, Inc.*, 44 F.P.C. 1260 (Oct. 20, 1970), the prior certificate opinion, *United Fuel Gas Co., et al.*, 44 F.P.C. 1051, makes clear that the *other-person* requirement was met. As the West Virginia Commission was regulating the rates, *service* and facilities of *Columbia Gas of West Virginia, Inc.*, 44 F.P.C. 1260, 1261, the system there involved was properly exempted.

Michigan Consolidated Gas Co., 46 F.P.C. 658, involved Hinshaw only incidentally. Michigan Wisconsin Pipeline was seeking a Section 7 certificate authorizing an exchange of gas with Michigan Consolidated, a company which had previously been exempted under Section 1(c). In disposing of the exchange application, the Commission simply reaffirmed Michigan Consolidated's exemption.

[25] Any fair reading of the initial decision of the examiner, 42 F.P.C. 310, 314-16, adopted by the Commission in *Mountain Gas Co.*, 42 F.P.C. 305, makes clear that all of the *jurisdictional gas* there involved was received from another person. 42 F.P.C. 316.

Nor does *Utah Gas Service Co.*, 38 F.P.C. 1219, stand for that proposition. As is clear from the opinion which originally granted the exemption to Mountain Fuel, *Mountain Fuel Supply Co.*, 32 F.P.C. 535, 536, the intrastate Orem-Uintah Basin Pipeline which was there exempted was not interconnected with Mountain Fuel's interstate facility.

3. The issue relating to Commission examination of the March 3, 1971 peak day flow diagrams presents no substantial question for review.[26] No one disputes that Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 556(e), authorizes the examination by the Commission of these diagrams, filed by United in accordance with Section 260.8 of the Commission Regulations. Rather the apparent complaint is that the Commission erred in trying to *understand* the diagrams and more importantly in using them to verify the actual and estimated flows that *were in the record.*

The complaint, in this connection, that petitioners did not have an opportunity to cross-examine the diagrams themselves (that is, the splits at identifiable points, the directions and the volumes) is patently frivolous. During the ten days of formal evidentiary hearings, not a single party challenged that information with respect to any of the flow diagrams that were in evidence.[27] And even if one accepts Commissioner Carver's suggestion, 47 F.P.C. 1021, 1025, that the Commission received *ex parte* interpretations of the diagrams which it then used to support a conclusion that some molecules of gas went from the Green-East facilities out of state, the receipt of those interpretations was harmless. Neither the Commission nor the Court of Appeals relied on the ability to trace some gas from the Green-East facilities across the state line. Once it is established, as it

---

[26] Of the two petitioners who brief this issue, only the State is in a position to raise it. LPL is precluded by Section 19(b), 15 U.S.C. § 717r(b), from urging the point because it did not urge it in its petition for rehearing before the Commission (R. 3425-27). *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492.

[27] The problem of charging the parties in one proceeding with notice of the contents of the record in another proceeding without giving the parties in the second proceeding a clear opportunity to respond to the incorporation of the other record, which was dealt with in *Public Service Comm'n* v. *FPC*, No. 71-1828 (D.C. Cir., Aug. 24, 1973) (Texas Gulf Coast Area Rate Cases), is not presented on this record.

is on this record, that the main line flows are across a state line, it is irrelevant whether any of the gas diverted from that main-line stream ever gets across a state line.[28]

CONCLUSION

For the foregoing reasons the multiple petitions for a writ of certiorari should be denied.

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December 14, 1973

---

[28] Text, *supra*, at 9-10.

APPENDIX A

INTERSTATE FLOWS IN NEW ORLEANS DISTRICT FACILITIES (Mcf)

Point	Annual	Peak Days	
	1969[1]	1970[2]	1971[3]
I	3,286,407	55,929	72,737
J	2,119,631	16,437	0
K	13,481	0	0
L	38,117,707	15,744	64,017
M	2,055,759	64,868	52,762
X	157,426	145	77
Total	45,750,411	153,123	189,593

[1] Ex. 2, p. 2, R. 107, 1321; Ex. Z-1 to United's Application, R. 2045.

[2] Item E, R. 558, 1651.

[3] Report filed pursuant to § 260.8 of the FPC's Regulations under the Act.

APPENDIX B

INTERSTATE FLOWS IN LAFAYETTE DISTRICT FACILITIES (Mcf)

Point	Annual 1969[1]	Peak Days 1970[2]	Peak Days 1971[3]
A	0	0	105,173
B	1,371,681	1,370	1,046
C	24,254,556	58,399	1,075
D	1,357,369	41,323	24,079
H	6,124,916	17,034	0
O	22,138,127	117,173	47,919
Total	55,246,649	235,299	179,292

[1] Ex. 2, p. 1; R. 107, 1320; Ex. Z-1 to United's Application, R. 2044.
[2] Item E, R. 558, 1648.
[3] Report filed pursuant to § 260.8 of the FPC's Regulations under the Act.

73-867

Supreme Court, U. S.
FILED
FEB 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. [redacted]

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioners

VS.

FEDERAL POWER COMMISSION
Respondent

BRIEF OF STATE OF TEXAS, AMICUS CURIAE, ON PETITION OF LOUISIANA POWER & LIGHT COMPANY, ET AL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. ____

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioners

VS.

FEDERAL POWER COMMISSION
Respondent

BRIEF OF STATE OF TEXAS, AMICUS CURIAE, ON PETITION OF LOUISIANA POWER & LIGHT COMPANY, ET AL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTEREST OF AMICUS CURIAE

The State of Texas is the country's leading energy producer of natural gas liquids and natural gas according to 1971 statistics from the Department of the Interior. Texas production of natural gas liquids comes to 49.6% of the national total, while the production of natural gas is 38% of the national figure. Of the State's

total production of oil and natural gas, approximately 61% is exported to meet the energy needs of the rest of the nation. (State Energy Policies — Policy Research Project — Research Bulletin No. 1, November, 1973. Lyndon B. Johnson School of Public Affairs, University of Texas at Austin).

The State of Texas has inherent power to regulate intrastate activities in the sphere of natural gas and it has delegated that power and duty to its Railroad Commission by duly enacting Articles 6050, et seq., Vernon's Texas Civil Statutes. The Texas Railroad Commission is actively exercising this power in carrying out its delegated obligations and duties.

Because of the State of Texas' concern with the protection and preservation of the natural gas resources of this State and the effect this protection has upon the health and welfare of the people of this State as well as the people of this nation, the State of Texas respectfully files this brief as Amicus Curiae.

The State of Texas respectfully urges that the petitions for writs of certiorari filed to review the judgment of the United States Court of Appeals for the Fifth Circuit in Case No. 72-1714, *Louisiana Power & Light Company, et al,* vs. *Federal Power Commission*, be granted.

REASONS FOR GRANTING THE WRIT

By the terms of the Natural Gas Act, the individual states of the United States are left free to exert control and regulate natural gas which is produced, transported, and consumed entirely within the State.

Also, by the clear intention of Congress, as expressed in the Hinshaw Amendment to the Natural Gas Act, facilities used to transport natural gas and which are subject to regulation by a State Commission have been held to be exempt from the Act when gas is received into those facilities within the same State in which the gas is then wholly transported and ultimately consumed.

In the instant case, in regard to gas entering United Gas Pipeline Company's Green System East, practically all if in fact not all of this gas is produced and transported in Louisiana, and *all of this gas is consumed entirely within the State of Louisiana.* Yet, by ignoring the case of *Peoples Natural Gas Company* vs. *Public Service Commission*, 270 U. S. 550, and by drawing non-existant distinctions and misconstruing the cases of *California* vs. *Lo-Vaca Gathering Company*, 379 U. S. 366, *Federal Power Commission* vs. *Amerada Petroleum Corp.*, 379 U. S. 687, and *Louisiana Public Service Commission* vs. *Federal Power Commission*, 359 F. 2d 525 (1966) in regard to the "commingling theory" of mixing what would otherwise be purely intrastate gas with interstate gas in gas pipelines, the

Federal Power Commission and the Court of Appeals have deprived the State of regulation of purely intrastate matters.

Likewise, in the instant case, the Federal Power Commission and the Court of Appeals, by misconstruing the Hinshaw Amendment, have extended Federal power into an area reserved to the states under the Congressional intent expressed in the Hinshaw Amendment and have effectively written the amendment out of the Natural Gas Act.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

The erroneous interpretation and application by the Court of Appeals of the "commingling theory" expressed in the cases of *Peoples Natural Gas Company* vs. *Public Service Commission*, 270 U. S. 550, *California* vs. *Lo-Vaca Gathering Company*, 379 U. S. 366, *Federal Power Commission* vs. *Amerada Petroleum Corp.*, 379 U. S. 687, and *Louisiana Public Service Commission* vs. *Federal Power Commission*, 359 F. 2d 525 (1966), should be rectified so that gas which is produced and consumed in one state is exempt from Federal Power Commission regulation under the Natural Gas Act.

The erroneous interpretation by the Court of Appeals of the Hinshaw Amendment to the Natural Gas Act should be rectified so that in accordance with the intent of Congress as expressed in Section 1(c) of the Act, gas which is received and consumed in one state is exempt from Federal Power Commission regulation and State jurisdiction is thus not diminished in those instances where Hinshaw exemptions have been applied in the past.

Respectfully submitted,

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I hereby certify that on this _____ day of February, 1974, two copies of Brief Amicus Curiae on Petition for Writ of Certiorari were mailed, postage prepaid to all counsel of record for the parties and that three copies were mailed, postage prepaid to the Solicitor General.

_____

John Milton Richardson

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FILED
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-872

STATE OF LOUISIANA,
LOUISIANA MUNICIPAL ASSOCIATION and
PARISH OF CAMERON,
Petitioners,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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OCTOBER TERM, 1973

No. 73-872

STATE OF LOUISIANA,
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Petitioners,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The States of Kansas, New Mexico and Oklahoma support the petition of the State of Louisiana and allied intervenors that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 28, 1973.

INTEREST AND ARGUMENT

Oklahoma, New Mexico and Kansas are, respectively, the third, fourth and fifth largest natural gas producing states in the nation. Together with Texas and Louisiana, these amici produced 92.7 per cent of all gas marketed in

the United States in 1971 and 91.2 per cent of all such gas in 1972.

In addition, a substantial percentage of the gas produced in these states is delivered to ultimate consumers within their borders by both interstate and intrastate pipelines although the major share of such gas, 65 per cent, is exported to other states.[1] Like Louisiana, Kansas, New Mexico and Oklahoma have intrastate pipelines within their borders which Congress did not subject to federal regulation in any respect, in enacting the Natural Gas Act of 1938, as amended. Such intrastate pipelines are presently subject only to state regulation and, in addition, each of the amici regulates the rates and services for local distribution of natural gas which is in itself exempt from all provisions of the Act under Section 1(b). Such state regulation also constitutes the basis for a so-called "Hinshaw" exemption under Section 1(c). Kansas, New Mexico and Oklahoma believe they are entitled to perpetuate their existing control over the operations of these intrastate pipelines which are a vital element in their economic welfare.

These amici believe that unless the decision below is reversed it will, with respect to certain of such intrastate pipelines, either eliminate or substantially dilute local control by transferring these state functions to the Federal Power Commission. They further believe that this case presents issues of exceptional and nationwide importance which warrant review by this Honorable Court for the reasons stated at length by Louisiana in its petition for certiorari.

---

[1] See Appendix A hereto.

CONCLUSION

WHEREFORE, Kansas, New Mexico and Oklahoma respectfully pray that Louisiana's petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

NATURAL GAS PRODUCTION AND USE WITHIN THE FIVE LEADING PRODUCING STATES

1971[1]

State	Marketed Production in millions of cubic feet	Rank	Percentage of State-produced gas used within State
Texas	8,550,705	1	49.1
Louisiana	8,081,907	2	22.6
Oklahoma	1,684,260	3	25.4
New Mexico	1,657,577	4	35.6
Kansas	885,144	5	26.4
TOTAL	20,859,393		34.8
U. S. Total	22,493,012		

1972[2]

Texas	8,657,840	1	[3]
Louisiana	7,972,678	2	
Oklahoma	1,806,887	3	
New Mexico	1,216,061	4	
Kansas	889,268	5	
TOTAL	20,542,734		
U. S. Total	22,531,698		

[1] Source: *Gas Facts*, 1971, American Gas Association, tables 26 and 30.

[2] Source: *Gas Facts*, 1972, American Gas Association, table 26.

[3] No data available for 1972.

CERTIFICATE OF SERVICE

This is to certify that I mailed three true copies of the foregoing instrument to which this certification is attached, to the following named persons, this ..... day of February, 1974:

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Nos. 73-550, 73-867, 73-868, 73-871, 73-872, 73-874

In the Supreme Court of the United States

OCTOBER TERM, 1973

TEXASGULF INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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4 Davis, *Administrative Law Treatise*, § 30.05 (1958)	11

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-550, 73-867, 73-868, 73-871, 73-872, 73-874

TEXASGULF INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (LPL App. A7-A31)[1] is reported at 483 F. 2d 623. The Federal Power Commission's initial opinion (No. 610, LPL App. A35-A76) and its opinion denying rehearing (No. 610-A, LPL App. A77-A85) are reported at 47 FPC 245 and 47 FPC 1021, respectively.

[1] "LPL App." refers to the appendix to Louisiana Power & Light Company's petition for a writ of certiorari, No. 73-867.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1973. Petitions for rehearing were denied on September 5, 1973. The petition for a writ of certiorari in No. 73-550 was filed on September 26, 1973, and each of the other petitions was filed on December 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), over a previously nonjurisdictional intrastate pipeline facility which now receives and transports substantial volumes of gas diverted from certificated interstate facilities.

2. Whether a pipeline facility is exempt from the Commission's jurisdiction pursuant to Section 1(c) of the Act, as amended, 15 U.S.C. 717(c), where the certificated interstate gas supplies received by that facility are not received "from another person" but only from another branch of the same company's integrated pipeline network, and where the services provided by the facility are not "subject to regulation by a State commission."

STATUTE INVOLVED

Section 1 of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, provides in pertinent part:

> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, indus-

trial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

STATEMENT

The issue in this case is whether the Federal Power Commission has regulatory jurisdiction over two portions of the pipeline system of United Gas Pipe Line Company (United)—known as the Green

System East and the Purple System—which are located entirely within the State of Louisiana and which have previously been operated by United as separate intrastate pipelines outside the Commission's jurisdiction. The Commission concluded, and the court of appeals upheld the conclusion, that the two systems have in fact become integrated parts of United's interstate system and are therefore subject to Commission jurisdiction under the Natural Gas Act.[2]

A. PROCEEDINGS BEFORE THE COMMISSION

On October 1, 1970, United filed an application with the Commission seeking a certificate of public convenience and necessity under Section 7(c) of the Act, 15 U.S.C. 717f(c), authorizing the continued operation of its Green and Purple Systems. After a hearing, the Commission ruled that United's introduction of "substantial quantities" of certificated interstate gas supplies into these previously intrastate,

[2] The status of the Green System East has been before the courts on a prior occasion. In 1971, after the instant proceeding had been initiated by United, Louisiana Power and Light Company, a petitioner here, sought a determination of the intrastate character of the Green System in the United States District Court for the Western District of Louisiana. That court dismissed the suit on the ground that the question was within the primary jurisdiction of the Commission. *Louisiana Power and Light Co.* v. *United Gas Pipe Line Co.*, 332 F. Supp. 692. On appeal, the court of appeals reversed, holding that the Commission does not have jurisdiction over the Green System because the injection of interstate gas into the system is minimal and irregular (456 F. 2d 326, 339). This Court reversed the judgment of the court of appeals, agreeing with the district court that the issue should have been decided first by the Commission. *Federal Power Commission* v. *Louisiana Power and Light Co.*, 406 U.S. 621.

uncertificated facilities caused a sufficient "commingling" of intrastate and interstate gas to subject the operation of both the Green and the Purple Systems, and all sales and services from those systems, to the Commission's jurisdiction (LPL App. A44–A45, A69–A70).

The Commission rested its conclusion on evidence showing that interstate gas enters the two systems at several points of interconnection with certificated facilities (*id.* at A41–A44) and that United would not be able to meet its peak-day and annual delivery requirements without these supplies of interstate gas (*id.* at A45–A47). Though the Commission stated that even an insubstantial amount of commingling would bring the facilities within its regulatory jurisdiction (*id.* at A50–A53), it found that the quantities involved were in fact "substantial" (*id.* at A44) and "not *de minimis*" (*id.* at A46).[3]

The Commission rejected the claim of several parties that a portion of the Green System is exempt from Commission jurisdiction under Section 1(c) of the Act, 15 U.S.C. 717(c) (LPL App. A52–A56). The

[3] The Commission also found that some gas transported in the Green and Purple Systems is delivered to interstate pipelines for transportation to states other than Louisiana (LPL App. A41–A42, A48–A49). The Commission stated in its opinion denying rehearing, however, that, while some Green System gas "appears to flow out of the state," that fact was not essential to its jurisdictional conclusions. "In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows" (*id.* at A78).

exemption applies to any person who would otherwise be subject to the Commission's jurisdiction and who is engaged in the transportation or sale for resale "of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, * * * provided that the rates and service of such person * * * be subject to regulation by a State commission." The Commission found that United's Green System is not exempt because (1) the Louisiana Public Service Commission is barred by the state constitution from regulating any aspect of a pipeline's sales of natural gas directly to industrial consumers (LPL App. A53–A54),[4] and (2) the Green System receives the interstate gas from United's own certificated interstate facilities and not, as the Act requires, "from another person" (*id.* at A53–A54, A56).

Having determined that it has jurisdiction over United's Green and Purple Systems, the Commission considered United's application for a certificate of

[4] Though the Federal Power Commission does not directly regulate the rates charged to direct industrial customers, it regulates other aspects of such direct service. Deliveries to direct customers may be made only pursuant to a certificate of public convenience and necessity issued by the Commission under Section 7(c) of the Act, 15 U.S.C. 717f(c), and a pipeline may not abandon its service to direct customers without the Commission's prior permission and approval under Section 7(b) of the Act, 15 U.S.C. 717f(b). As the Commission stated, "[t]he price at which the direct industrial sale is made is * * * material in both certificate and abandonment proceedings" (LPL App. A55). It follows that "the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State" (*ibid.*).

public convenience and necessity with respect to those facilities (*id.* at A59–A65). If found that "the evidence in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity" (*id.* at A64–A65), and it accordingly remanded the case to the Presiding Examiner for additional evidentiary proceedings (*id.* at A65, A70).[5]

The Commission thereafter denied applications for rehearing (*id.* at A77–A85).

B. THE DECISION BELOW

The court of appeals affirmed the Commission's orders (*id.* at A7–A31). It accepted the Commission's evidentiary findings concerning the amounts of interstate gas introduced into the Green and Purple Systems (*id.* at A19–A21, A30). Giving due deference to the Commission's judgment "on an issue where that body's initimate knowledge of the specific problems is concerned" (*id.* at A23), the court declined to set aside the Commission's determination that "the injections of gas of an interstate character are not minimal and irregular, but are indeed substantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments" (*id.* at A22). It accordingly

[5] The Commission subsequently issued certificates of public convenience and necessity for the Green and Purple Systems (Opinions No. 661 and No. 661–A, issued July 20, 1973, and September 14, 1973). Petitions to review that action of the Commission were filed in the Court of Appeals for the District of Columbia Circuit and are pending *sub nom. State of Louisiana, et al.* v. *Federal Power Commission*, Nos. 73–1994, 73–2004, 73–2146.

held that the Commission correctly asserted jurisdiction over United's facilities pursuant to Section 1(b) of the Act (*id.* at A24, A29–A31).[6]

The court also sustained the Commission's determination that United's facilities are not exempt under Section 1(c) of the Act (*id.* at A24–A29). It reviewed the legislative history of the 1954 amendment adding Section 1(c) to the Act (the "Hinshaw Amendment") and concluded that "Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems" (*id.* at A25). That, the court stated, is why the amendment limits exemptions to persons who receive gas "from another person": "[T]he requirement of a 'person-to-person' exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same 'person' " (*id.* at A27).

The court held that United's Green System "has ceased to be an intrastate facility and has become, instead, a local branch of an integrated pipeline"

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[6] The court thus found it unnecessary to consider whether "one molecule [of interstate gas] would be sufficient to automatically confer federal control" (LPL App. A23). This Court has held that the Commission's jurisdiction over the transmission of electrical energy in interstate commerce, pursuant to the analogous provisions of the Federal Power Act (16 U.S.C. 824(b)), attaches "no matter how small the quantity" of power that flows in interstate commerce, "because it is settled that Congress has not 'conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not . . . supply such a jurisdictional limitation by construction.' *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 536." *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 461, n. 10.

(*ibid*). With respect to that system, the "other person" requirement is not satisfied. The court stated (*id.* at A28):

> At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points—the points at which the exemption must take effect, if at all—the "person-to-person" requirement simply is not met.

The Purple System is also "part of an integrated pipeline network involving significant transportation of interstate volumes" (*id.* at A31). As with the Green System, "[s]ignificant volumes of gas from interstate facilities are introduced into the Purple System for local sale" (*id.* at A30). In addition, even if the gas were received "from another person," it could not be said that "all the natural gas so received is ultimately consumed within" Louisiana (Section 1(c), 15 U.S.C. 717(c)). As the court stated (LPL App. A30) in upholding the Commission's findings (*id.* at A41–A42), "[g]as clearly flows out of this system for interstate markets * * *."

ARGUMENT

The decision of the court of appeals is correct, and there is no need for further review.

1. Only three petitioners challenge the court's holding that United's facilities are within the Commission's jurisdiction under Section 1(b) of the Act.

a. No petitioner directly attacks the evidentiary findings upon which the Commission rested its jurisdic-

tional determination. Two parties argue (LPL 7, 9–10; LA 7–8),[7] however, that the Commission improperly relied on "officially noticed facts concerning United's peak day flows" (LA 7).

The extra-record data of which petitioners complain, and to which Commissioner Carver referred in his dissenting opinion (LPL App. A83–A84), consists of two "flow diagrams" filed by United pursuant to the Commission's reporting requirements for pipelines (18 C.F.R. 260.8). The diagrams show the amount of interstate gas introduced into United's Green and Purple Systems on March 3, 1971, the peak delivery day of the 1970–1971 winter heating season. Similar diagrams for January 6, 1970 (the peak day of the 1969–1970 winter heating season) and for the 12-month period ending December 31, 1969, were part of the record in the case (see LPL App. A40).

While the Commission took official notice of the two diagrams and referred to the facts they reflect about the peak day of March 3, 1971 (see *id.* at A41–A44), that information was cumulative of the unchallenged facts in evidence with respect to annual flows for 1969 and peak day flows on January 6, 1970. No finding rests solely on the challenged flow diagrams, and the Commission's opinion suggests that the diagrams were not even an essential underpinning of any find-

[7] We use the following abbreviations to signify the six petitions: "TG" (Texasgulf Inc., No. 73–550); "LPL" (Louisiana Power & Light Co., *et al.*, No. 73–867); "LGS" (Louisiana Gas Service Co., *et al.*, No. 73–868); "EX" (Exxon Corp. and Texaco Inc., No. 73–871); "LA" (State of Louisiana, *et al.*, No. 73–872); "NO" (New Orleans Public Service Inc., No. 73–874).

ing. It states that "[t]he peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations *as well as* the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities" (*id.* at A47).

The court of appeals apparently was satisfied that the annual 1969 and peak-day 1970 diagrams by themselves fully supported the Commission's findings. In sustaining those findings it did not refer to the challenged diagrams from peak-day 1971 (see *id.* at A19–A21, A30), nor did it explicitly address the contention that those diagrams were improperly noticed by the Commission.

In these circumstances, where the Commission's reference to extra-record facts was cumulative and corroborative of substantial evidence already in the record, any error with respect to official notice is harmless and does not require review by this Court.

b. Louisiana Power argues (LPL 7, 10–11) that the court of appeals erroneously applied a "rational basis" test rather than a "substantial evidence" test in upholding the Commission's jurisdictional determination. But it is clear from the court's opinion that it found substantial evidence to support each of the Commission's evidentiary findings concerning the amounts of interstate gas introduced into the Green and Purple Systems. It properly applied a "reasonable basis" standard only in reviewing and upholding the Commission's *judgment* that those amounts are substantial and that the two systems are part of an integrated interstate pipeline system. See 4 Davis, *Administrative Law Treatise*, § 30.05 (1958); *Ameri-*

can Smelting and Refining Co., et al. v. *Federal Power Commission* (C.A.D.C., Nos. 72–2204, *et al.*, decided January 21, 1974), slip op. 32–33.

c. It follows from this Court's decisions in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, and *Federal Power Commission* v. *Amerada Petroleum Co.*, 379 U.S. 687, that the Commission has jurisdiction over the Green and Purplé Systems. Those cases hold that, where interstate gas is commingled with intrastate gas in a pipeline facility, the operation of that facility and the sales and service rendered by means of the facility are subject to the Commission's jurisdiction. See *Louisiana Public Service Commission* v. *Federal Power Commission*, 359 F. 2d 525 (C.A. 5), certiorari denied, 385 U.S. 833.

Petitioners argue (LPL 7–8; LA 14–15; NO 8) that *Lo-Vaca* and *Amerada* are distinguishable, because in those cases the "channel of the constant flow" (379 U.S. at 369) of the gas was interstate whereas here the channel in the Green System East is entirely intrastate. But the relevant "channel of the constant flow" in this case is not that of the Green System East but rather that of the interstate pipeline facility from which substantial quantities of gas are taken for introduction into the Green System East. What matters for jurisdictional purposes is whether the gas thus introduced is interstate gas, and that in turn depends on whether it has been diverted from an interstate channel of constant flow.

Lo-Vaca and *Amerada* hold that gas produced and sold within the same state is nevertheless sold "in interstate commerce" if it has been diverted from a

pipeline facility carrying gas destined for out-of-state delivery. No party contends that the gas introduced into the Green System East is not diverted from precisely such an interstate channel. It is therefore immaterial that the diverted gas itself may never have left the State of Louisiana.[8]

2. All the petitioners argue that the Green System is nevertheless exempt from Commission jurisdiction under the Hinshaw Amendment, Section 1(c) of the Act, 15 U.S.C. 717(c). Louisiana argues (LA 21–22) that the Purple System is also exempt.

a. Petitioners claim (TG 10; LGS 8–9; LA 20) that Section 1(c)'s requirement that the interstate gas be received "from another person" need not be satisfied precisely at the point of interconnection between an interstate facility and an allegedly exempt facility. The court of appeals correctly rejected that argument. As the legislative history shows (LPL App. A 26), the Hinshaw Amendment was not designed to exempt "local branches of integrated interstate systems" (*id.* at A 25). The "requirement of a 'person-to-person' exchange at the point of receipt ensures that the statutory exemption will not extend to local

[8] It is also immaterial whether, as some petitioners allege, United contrived to bring its Green and Purple Systems within federal jurisdiction, or whether, as the Commission found (LPL App. A56), the introduction of interstate gas was necessary to permit United to meet its delivery requirements from the Green and Purple Systems. As the Commission correctly concluded, under the Natural Gas Act motive is not a relevant jurisdictional consideration. "[T]he jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination" (*ibid.*).

branches of a single interstate system, all of which is operated by the same 'person'" (*id.* at A 27).[9]

[9] Petitioners claim (TG 10; LGS 9; EX 9–10; NO 6–7) that the Commission's prior decisions are inconsistent with its present view of the "from another person" requirement. The cases they cite, however, are distinguishable. In *United Gas Pipe Line Co.*, 35 FPC 172, and *Columbia Gas of West Virginia, Inc.*, 44 FPC 1260, the Commission's orders make clear that the exempt facilities purchased all their gas from other companies. In *Mountain Gas Co.*, 42 FPC 305, and *Pennzoil Pipeline Co.*, 44 FPC 291, the exempt facilities obtained all their *interstate* gas from other companies. Although they also used gas produced within the State by the companies themselves, there is no indication that the locally produced gas was diverted from any interstate facilities of the companies. *Michigan Consolidated Gas Co.*, 46 FPC 658, is inapposite. The Commission merely ruled in that case that an existing exemption for a facility purchasing all its gas from other companies would not be lost if the facility implemented a gas exchange agreement with another pipeline within the State.

Utah Gas Service Co., 38 FPC 1219, on rehearing, 39 FPC 388, involved a special situation. The company operating the exempt facility in that case, unlike United in this case, was "engaged principally in the distribution of gas" within the State of Utah and did "not make any sales for resale off the [exempt] Orem-Uintah line" (38 FPC at 1219). The gas for the exempt line was obtained from another company, Cascade Natural Gas Company, and all of that gas was consumed in Utah (*ibid.*). Although there were allegations that the company's interstate facilities were connected with its Orem-Uintah line, it appears from the dissenting opinion of Commissioner Ross (*id.* at 1221) that the gas allegedly flowed out of, rather than into, the Orem-Uintah line, and was thereafter commingled with gas from the company's interstate facilities. In those circumstances, the issue was not whether the gas received by the exempt line was received "from another person"—it clearly was received from Cascade—but rather whether the gas that *left* the system was ultimately consumed in Utah. The Commission found that it was (*id.* at 1219).

Petitioners argue that the person-to-person requirement is satisfied because the gas introduced into the supposedly exempt Green System East was purchased by United from independent producers within Louisiana (TG 10). But that gas is then transported in United's certificated interstate facilities before a portion of it is diverted for introduction into the Green System. Thus, while the person-to-person requirement is satisfied at the point of purchase, the additional requirement that all the gas be "ultimately consumed within" the State cannot be met, because only the portion diverted for the Green System is ultimately consumed within the State. Conversely, while the "ultimately consumed" requirement can be met at the point of interconnection, the person-to-person requirement cannot. Viewed at either point, the transaction is not within the terms of Section 1(c).[10]

b. There is no merit to Louisiana's claim (LA 21–22) that United's Purple System is exempt from Commission jurisdiction. Like the Green System, the Purple System receives substantial volumes of gas that are diverted from other United facilities carrying gas for ultimate out-of-state delivery (LPL App. A30, A42). Since the interstate gas is not received

[10] In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464—the decision that the Hinshaw Amendment was designed to overcome—the situation was quite different. The company there received gas within Ohio from interstate pipelines and transported it for ultimate consumption within Ohio. All the gas it received at the point of interconnection was "from another person" and all was destined for consumption within the state.

"from another person," the Purple System is not exempt under Section 1(c).

The Purple System is disqualified for another reason. Even putting aside the interstate gas received from other United facilities and looking only to the gas received within Louisiana from other companies (*id.* at A 41–A 42), the system cannot qualify because not "all the natural gas so received is ultimately consumed within such State" (Section 1(c), 15 U.S.C. 717(c)). The Commission found that substantial volumes of gas *leave* the Purple System and are delivered to an interstate pipeline "for transportation out of the State of Louisiana" (LPL App. A 42). The court of appeals sustained that finding. It stated that "[g]as clearly flows out of this system for interstate markets" (*id.* at A 30).[11]

[11] Although the court of appeals did not reach the issue, we note that there is still another reason why neither the Green nor the Purple System is exempt. Louisiana's constitution (see LPL App. A 53, n. 8) precludes the State Public Service Commission from regulating "any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process * * *." Thus, neither of United's systems qualifies for an exemption, because in neither system are "the rates and service" provided through the system "subject to regulation by a State commission" (Section 1(c), 15 U.S.C. 717(c)). The Federal Power Commission, by contrast, does have regulatory authority over the service of gas to direct customers (see p. 6, n. 4, *supra*). The Commission therefore properly concluded that "an exemption would not be available, even to a separate pipeline company" in Louisiana (LPL App. A 54).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 10 1974
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1973

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v.

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY OF TEXASGULF INC. TO BRIEFS IN OPPOSITION OF RESPONDENT AND INTERVENOR

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April 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY OF TEXASGULF INC. TO BRIEFS IN OPPOSITION OF RESPONDENT AND INTERVENOR

Respondent Federal Power Commission (FPC) and United Gas Pipe Line Company (United) oppose the grant of the petitions for writ of certiorari filed herein. Their briefs warrant additional comment.

I.

THE FPC WILL NOT LOSE THE JURISDICTION OVER CURTAILMENTS IT ALREADY ENJOYS

United alleges that if its Green System-East is "Hinshawed", FPC curtailment authority over substantial industrial volumes will be destroyed, leaving a regulatory gap. (United Br. pp. 12-13). The argument is quite unrealistic.

The FPC has already held, with reference to its curtailment jurisdiction over gas sold by United, that it has no jurisdiction over what happens to gas after it is delivered to a wholesale customer. This determination took the form of a refusal by the Commission to approve a term of United's proposed tariff which would have allowed United to prevent a local public utility from reselling gas to a direct industrial customer United was curtailing

> "Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale. This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body. We will of course consider the past and planned disposition of volumes by the customers when ruling upon allocations for the various customers, but after allocation among United's customers, we leave for the states or other local bodies the job to oversee the distribution of that gas by the customers at the local level. . . ."[1]

The FPC exercises its curtailment jurisdiction—as it does its rate jurisdiction—at the point where the delivery of gas is made by the pipeline company to the customer. The curtailment plan of the pipeline company serves to determine how much gas will be delivered to the pipeline's customer. It does not seek to require that the gas actually be consumed by the end user whose need the FPC considered in allocating the available gas among the pipeline's customers.

United curtailed service on its Green System-East long before the FPC claimed jurisdiction in this pro-

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[1] *United Gas Pipe Line Co.*, 46 F.P.C. 786, 807 (1971).

ceeding over that system. FPC jurisdiction was not a prerequisite to curtailment by United.

The FPC will retain jurisdiction under Section 1(c) of the Natural Gas Act to determine how much gas is delivered into the Green System-East, just as it now retains similar jurisdiction over United's deliveries into the systems of wholesale customers like Mississippi Valley Gas Company, Mobile Gas Service Corporation and Clarke-Mobile Gas District which are exempt from FPC jurisdiction and which serve direct industrial customers in the States of Mississippi and Alabama.

II.

UNITED'S SALES AND SERVICE ON THE GREEN SYSTEM-EAST ARE "SUBJECT TO REGULATION BY A STATE COMMISSION"

To be exempt under 1(c) of the Natural Gas Act, the sales, service and facilities of the pipeline company must be "subject to regulation by a State Commission."[2] This language is intentionally consistent with the definition of State commission in the statute[3] and was used on the recommendation of the National Association of Railroad and Utilities Commissioners.[4]

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[2] Petitioners are not here seeking exemption from FPC jurisdiction for producers selling gas to United, as the FPC suggests (Br. p. 15). All gas volumes sold by producers to United and resold by United on the Green System-East necessarily are "ultimately consumed within" the State within the meaning of Section 1(c).

[3] Section 2(8) of the Natural Gas Act defines "State commission" as "the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality." 15 U.S.C. 717a(8).

[4] Hearing on Natural Gas Act (Distribution) before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 83d Cong., 1st Sess., p. 10 (1953).

Enactment of Section 1(c) was supported by a representative of the Louisiana Public Service Commission who indicated to Congress that the state commission then had jurisdiction requisite to enjoyment of the proposed exemption.[5] We anticipate that the State of Louisiana, in its reply brief, will advise this Court of the current state of evolving local regulatory law affecting direct sales in Louisiana in times of gas shortage.[6]

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted.

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[5] *Id.* at 32.

[6] The FPC does not deny it has only limited jurisdiction over direct sales (see FPC Br. n. 11), a jurisdiction which is not reduced by "Hinshawing" the Green System-East. See discussion under Section I, *supra*.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED

APR 12 1974

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OCTOBER TERM, 1973

Nos. 73-550, 73-867, 73-868,
73-871, 73-872, 73-874

TEXASGULF INC., *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY OF EXXON CORPORATION AND TEXACO INC. TO BRIEF OF THE FEDERAL POWER COMMISSION IN OPPOSITION

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April 12, 1974

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

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RESPONSE

In its brief in opposition to petitions for writs of certiorari, the Federal Power Commission (Commission) presents, in capsule form, arguments which it might make in its brief on the merits after certiorari is granted. It wholly ignores the central issue raised by Exxon Corporation (Exxon) and Texaco Inc. (Texaco) that the lower court's interpretation of Section 1(c) of the Natural Gas Act (Act) would deny the operative purpose of Section 1(c), namely, to relegate matters of local concern to the states.[1]

---

[1] Exxon and Texaco limit this reply, like their joint petition, to the Section 1(c) exemption issue. Our limitation should not be

The Commission's circumscribed argument focuses upon two specific criteria for exemption under Section 1(c) and claims that such criteria have not been met. Briefly, these are the "receipt from another person" and the "state regulation" arguments. The Commission is plainly wrong in each of its arguments. We will, of course, analyze the Commission's arguments in detail in our brief on the merits. However, at this juncture, we ask the Court to note carefully that the Commission has essentially ignored the major premise of the lower court's decision that Section 1(c) was intended only to exempt local distribution companies. (App. at 21a-22a) Certainly, such is not the case. Before the Hinshaw Amendment, most local distribution companies were already exempt under Section 1(b) of the Act. Accordingly, there was no need for additional legislation to exempt local distribution.

The *East Ohio* case,[2] which engendered Section 1(c), stood squarely for the proposition that statewide pipeline

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construed as agreement with the Commission's interpretation of facts or law on other issues. For example, the Commission's assertion that the "relevant channel of constant flow in this case is not that of the Green System East . . ." is obviously wrong when jurisdiction or exemption of the Green System-East is involved. From the vantage point of all gas consumed in the Green System-East the channel of constant flow from sources in Louisiana to the burner tip is wholly within the State, *i.e.*, intrastate. Moreover, the Commission's interpretation (Br. at 12) of California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965) and FPC v. Amerada Petroleum Co., 379 U.S. 687 (1965) is in error. Those cases do not stand for the proposition that any gas taken from a stream within the source state is jurisdictional if some other gas in that stream is transported and sold outside the state. Quite the contrary, Lo-Vaca and Amerada stand for the proposition that a sale by a supplier within the source state is not exempt merely because equivalent quantities are withdrawn from the stream within the state. Since it could not be shown that gas supplied by Lo-Vaca and Amerada would, in fact, be consumed within the source state, their sales were held to be jurisdictional. By contrast, all the gas on the Green System-East is consumed within the State of Louisiana.

[2] FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

operations, entirely within a consuming state, which involved gas received from out of state are subject to Commission regulation, despite their local nature. The touchstone of exemption under Section 1(c), as the legislative history[3] and statutory language[4] makes clear, is the local nature of the activity involved. The Commission's brief does not address this issue.

In failing to come to grips with the determinative issue, the Commission also misinterprets or inaccurately analyzes several of the cases cited by Exxon and Texaco in their joint petition. For example, the Commission seeks to dismiss *Columbia Gas of West Virginia, Inc.*, 44 F.P.C. 1260 (1970) and *Michigan Consolidated Gas Co.*, 46 F.P.C. 658 (1971) on the ground that those cases involved receipt of gas from another corporate entity (Br. at 14, n. 9). But, those cases were cited (Pet. at 9) to illustrate, contrary to the lower court's theory, that the Section 1(c) exemption is not limited to distribution companies but applies to statewide pipeline companies.

Likewise, the Commission is incorrect in its analysis of *Mountain Gas Co.*, 42 F.P.C. 305 (1969) for that case did involve facts parallel to the Green System-East operations. In *Mountain*, Cabot Corporation moved gas from sources in West Virginia to its Bradley Compressor Station where the stream was split, part going to a separate interstate pipeline company for transportation out

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[3] See, *e.g.*, "Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 83rd Cong., 1st Sess., on H.R. 2679 and H.R. 3707 Bills to amend the Natural Gas Act of 1938, as amended, and H.R. 3769, H.R. 3892, H.R. 5298, and H.R. 5976, Bills to amend Section 1 of the Natural Gas Act" (June 29, 1953, pp. 5, 8, 18, and 25). *See also*, 100 CONG. REC., Vol. 48, pp. 3042-4043, (daily ed. March 15, 1954). Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364, 368 (D.C. Cir. 1959).

[4] Section 1(c) of the Natural Gas Act declares in part "[t]he matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States."

of state and the remainder being delivered into Cabot's pipeline system for which Section 1(c) exemption was declared.

In *Utah Gas Service Co.*, 38 F.P.C. 1219 (1967), *reh. denied*, 39 F.P.C. 388 (1968), the significant point to be emphasized is that Mountain Fuel's Orem-Uintah line (exempt) "is an integral part of the jurisdictional facilities of the Mountain Fuel system which extends through Wyoming (where some sales for resale are made) into Utah. . . . Physically, this would indicate that there is a floating point on the system where the gas from the jurisdictional and nonjurisdictional systems mingle." (*Id.* at 1221-1222)

The Commission also overlooks the fact (Br. at 14, n. 9) that *Pennzoil Pipeline Co.*, 44 F.P.C. 291 (1970) involves operation of a pipeline system in Texas which forms an integral part of United Gas Pipe Line Company's interstate system where Louisiana gas, as well as Texas-produced gas, is received into the Texas system. For years, United chose to operate the system on a jurisdictional basis, but in 1970 elected to set up an affiliate and obtained an exemption. Today, as an exempt company, its operations are no more "local in nature" merely by reasons of the establishment of a corporate veil.

Finally, the Commission argues (Br. at 16) that the Green System-East does not qualify for exemption because the State of Louisiana cannot regulate direct industrial sales. Although the Commission, itself, is forbidden by Section 1(b) from regulating direct sales, it claims authority over transportation of gas to be used for direct sales and argues that such transportation is beyond the power of the State of Louisiana. But the Commission is simply wrong. The limitation in the Louisiana Constitution applies to direct sales just as the restriction of Commission jurisdiction under Section 1(b) of the Natural Gas Act applies to direct sales. The State is not pro-

hibited from regulating transportation. In fact, in December 1973, Louisiana enacted into law the Natural Resources and Energy Act of 1973 (La. Rev. Statutes, Title 30, Ch. 7, Extraordinary Session 1973, Senate Bill No. 9) which makes clear that the State can regulate transportation. Moreover, as we pointed out in our petition (Pet. at 11-12) exemption under Section 1(c) is entirely consistent with application of a uniform federal curtailment policy. Implementation of State regulation of the Green System-East through exemption under Section 1(c) will effectively coordinate State and Federal authority and carry forward the purpose of the Hinshaw Amendment.

CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as for the reasons set forth in their joint petition, Exxon and Texaco request that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

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APR 15 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-867

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioners

versus

FEDERAL POWER COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL AND REPLY BRIEF OF LOUISIANA POWER AND LIGHT COMPANY

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SUPPLEMENTAL AND REPLY BRIEF OF LOUISIANA POWER & LIGHT COMPANY

The Government in the Brief of the Federal Power Commission in Opposition to LP&L's application herein predicates its argument upon the erroneous and misleading assertion: "No petitioner directly attacks the evidentiary findings upon which the Commission rested its jurisdictional determination." (FPC Br. pp. 9-10) The simple truth is that Louisiana Power & Light Company has made such a direct attack consistently since such findings issued, most recently in its petition:

"The principal basis for the FPC's conclusion that interstate gas was being infused into the Green System East derives from the circumstances existent at Points I and J of United's flow diagram, Appendix C herein at A-98. The record before the FPC showed clearly that the same situation exists at both Points: The gas comes from the field to a gas processing plant (Getty Oil at Point I, Humble at Point J) and after being processed, i.e., removing hydrocarbons such as propane or butane, United takes delivery of the gas from the plant and places the gas into one of two lines—one that goes to the Black (interstate) System, the other that goes to Green System East (See the diagram, Exhibit 29, reproduced in Appendix "C" hereto at A-98). There is no basis in this record for a conclusion of commingling.

"As for Points L and M, any reliance by FPC on those situations runs afoul of its own witnesses (Tr. 323-324, 556) who testified that Green gas could not get into the Black System because the Green System operated at a lower pressure than the Black System and there were no compressors on the Green System with which to lift the pressure so that it could enter the Black System. Additionally, such a conclusion by the FPC would render the whole proceeding before it an absurdity because the basic premise upon which United was supposedly required to infuse Black Gas into the Green System was the shortage of gas for the Green System. How then could the Green System be an exporter to the Black System as suggested by the FPC and seriously discussed by the Court of Appeals?" (LP&L 8, f.n. 2)

In its petition LP&L carefully pointed out:

"[T]hat the Court of Appeals is clearly on the inescapable horns of a dilemma: Either the Green System is intrastate by reason of no Black gas being infused into it or, if Black gas is infused,

then Section 1(c) is applicable. Let us explain by reference to the record facts. In Appendix C at p. A-98 we have reproduced in detail the delivery situation at Point I, which detail is also applicable to Point J, these being the only relevant points of connection. Now, the record shows that the gas goes through the gas processing plants (which are owned by Getty Oil Company at Point I and Humble at Point J) which extract hydrocarbons (propane, butane, etc.) from the gas, and the gas is then delivered to United. If it be concluded that the delivery point is immediately upon leaving the Getty Plant (marked by us 'Point of Entry'), then the gas is being delivered to United--a 'person'—by Getty—'another person'--and the 'person-to-person' requirement is obviously satisfied. On the other hand, if it be concluded that the delivery from Getty to United takes place after the gas passes through the 93' of separators, regulators, and meters (at the place we have marked 'Point of Separation'), then there is no infusion of Black gas into the Green System. Under the requirement established by the Court of Appeal, either the Green System East is intrastate or it is entitled to a Hinshaw Amendment." (LP&L 12-13)

Of course, this argument by Louisiana Power & Light Company was subsumed under its discussion of pure questions of law, which it deemed to be the proper matter for a Petition for a Writ of Certiorari.* The Government's raising of this issue of fact constitutes a confession that the Court to dispose of this case must consider it on the merits and, therefore, the Writ of Certiorari should be granted.

For the convenience of the Court in following the arguments raised with respect to Points I and J, Louisiana Power & Light Company is including as Appendix A hereto

* Significantly, the Government did not cite and cannot cite any portion of the appellate court's opinion to sustain its claim (FPC Br. 11) that the substantial evidence test was applied as required by law.

the flow diagram which it previously attached as page A-98 of the Appendix to its Petition (Appendix C). With respect to Points L and M, discussed by Louisiana Power & Light Company in its Petition, LP&L would like to supplement its Petition by noting the subsequent observation of the Presiding Administrative Law Judge of the Federal Power Commission in the related case of United Gas Pipe Line Company and Texas Eastern Transmission Corporation, Docket No. CP67-26, decided January 15, 1974. There the Administrative Law Judge noted: "Similarly United indicates that the proposed condition declaring that approval of the exchange will not be deemed to authorize any gas in United's Green System-East to be sold or transported outside Louisiana would be useless because United has no intention of doing so; and that, furthermore, *the record in Docket No. CP71-89 makes clear that it would be impossible for this to happen (because of existing pressure differentials) without additional construction subject to the Commission's jurisdiction.*" (Emphasis added.) This observation confirms LP&L's position and belies the conclusion by the Federal Power Commission (Opinion No. 610 at LP&L A-48;* Opinion No. 610-A at LP&L A-78) and the argument advanced by United Gas Pipe Line Company to the Fifth Circuit (United Br. pp. 21-22, Appendix B hereto) that the gas of the Green System-East ever became commingled with gas in interstate commerce. This point is quite important because Louisiana Power & Light Company in its Petition *relied upon this Court's decisions* in *California v. Lo-Vaca Gathering Company*, 379 U.S. 366 and *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687 (and did not, as the Government states, argue that these cases are "distinguishable") which require such commingling before an intrastate system can be converted into an interstate one.

* Noted by the Government at p. 5, f.n. 3 of its Brief herein.

CONCLUSION

The Government's contention that "[n]o party contends that the gas introduced into the Green System East is not diverted from precisely such an interstate channel" is both false and immaterial. It is false because Louisiana Power & Light Company did point out and has established that the gas introduced at Points I and J, the only gas arguably substantial, is not diverted from any interstate channel of gas. However, this falsity is immaterial because the test under *La Vaca* and *Amerada* is whether such gas is intermingled in a channel of constant flow, which is not the case here because of the situation extant at Points L and M. Therefore, Louisiana Power & Light Company urges the Court to grant certiorari and reverse the patently erroneous decision of the Fifth Circuit in this matter.

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I hereby certify that on this 12th day of April 1974 three copies of the foregoing were mailed, postage prepaid to all counsel of record for the parties in Docket Nos. 73-867, 73-868, 73-550, 73-868, 73-871, 73-872 and 73-874.

s/ Andrew P. Carter

APPENDIX A

EXHIBIT 29

United file a Section 7(c) certificate application.[39] The filing of the application triggers the FPC inquiry into price and other factors made mandatory by *CATCO* and *Transco* and the FPC concern that the ultimate resale consumer not be saddled with direct-sale costs that should be covered by direct-sale revenues. Admittedly, the finding of jurisdiction is helpful to United; however, the real beneficiary is the ultimate consumer.

The substantial dependency of Green-East on interstate gas and the ability of the Green-East facilities to deliver substantial peak day volumes of interstate gas is, by itself, substantial evidence supporting the FPC's determination that the New Orleans District facilities, including the Green-East facilities, are integrated into United's interstate operation. In addition, the Court should understand that these pipes are not colored. Although the maps are colored for convenient reference, the gas moves in the New Orleans District facilities (both Green-East and West) freely. The only place that Green *System*-East exists is in the minds of the petitioners. Shell's description (Shell Br. 13), for example, of the 8.3 million Mcf flow from Green East into Green-West, where it was commingled with interstate gas from the Napoleonville-Kosciusco line and in turn delivered to Mid-Louisiana Gas for consumption in the Baton Rouge area within the Lafayette District, demonstrates that fact.

Whether or not any of the Green-East gas ever gets out of the state of Louisiana is beside the point.[40] Such a

[39] Those who describe the interstate flows as unauthorized implys that, despite the confusing factual picture presented to United and the FPC Staff after *Florida Parishes* (Text, *supra* at 3-4), United should have filed its application earlier. This is an extraordinary position in view of the arguments of several, including some of the same petitioners, that no certificate is needed because the facilities are nonjurisdictional.

[40] *See infra* at 22.

flow demonstrates the substantial integration of United's main Louisiana pipelines and the other Louisiana facilities with its remaining interstate operations. This is all United understood the FPC to mean when it said (R. 3443, ¶ 39):

> Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities.

Had it intended to base its jurisdictional finding on being able to trace some gas out of Green-East across a state line it would have said so.

Again, Commissioner Carver's characterization of the majority opinion (R. 3684) is inaccurate, and the petitioner's argument (Shell Br. 14; NOPSI Br. 7) based on Commissioner Carver's view is unfounded.

This same flow from Green-East to Green-West and over into Mid-Louisiana's facilities near Baton Rouge also disposes of the eleborate arguments based on pressure and lack of compression which are designed to suggest that once gas gets into Green-East it never gets back out.[1]

This leaves only the argument that the gas is produced, transported and consumed wholly in Louisiana. That was true in *Lo-Vaca* and *Florida Parishes*. For example, the FPC opinion in *Florida Parishes* states:

> No contention is made, and there is admittedly no possibility that the gas which is the subject *of that sale* by United, *or any part thereof*, will thereafter be transported in interstate commerce outside the state of Louisiana. 30 FPC 560, 584.

That fact did not alter the jurisdictional result there: it does not alter it here.

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[1] Emphasis added.

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REPLY BRIEF OF LOUISIANA GAS SERVICE COMPANY

In its Brief for the Federal Power Commission in Opposition, the Government raises the argument that United's facilties are not exempt under the Hinshaw Amendment [Section 1(c) of the Natural Gas Act, 15 U.S.C. Section 717(c)] because the Federal Power Commission has a kind of regulatory authority over natural gas pipelines which the Louisiana Public Service Commission somehow lacks under the Louisiana Constitution of 1921 (Government Brief, p. 16, fn. 11; p. 8, fn. 6). In addition to the fact that the argument advanced by the Government is insufficient to warrant denial of the petition for Writ of Certiorari, because the Court of Appeals expressly declined to base its opinion on this ground, this Court should reject the Government's argument as unsupported by the authority

which it cites. The only correct element in the Government's reasoning is its tacit admission that the relevant body of law establishing the jurisdiction of the Louisiana State Public Service Commission is the Louisiana Constitution. Article VI, Section 4 of the Louisiana Constitution of 1921 is mandatory and self-operative in its granting of jurisdiction to the Commission over all aspects of regulation of public utilities not expressly excluded by that article. This point is fully developed by Commissioner Nat B. Knight in his article *Work of the Louisiana Public Service Commission*, 16 Tulane Law Review 1 (December 1941), and constitutes the cornerstone of the Louisiana law of public utilities. The only aspect of regulation of natural gas pipelines excluded from the Commission's jurisdiction by the Constitution at present is, as stated by the Government, "any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process * * *." This provison precludes the Commission from asserting jurisdiction over direct industrial *sales* of natural gas *to the same extent* that Section 1(b) of the Natural Gas Act, 15 U.S.C. Section 717(b), precludes the Federal Power Commission from asserting such jurisdiction for the reason that such gas is not sold for resale. *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S.621. Therefore, no lacuna exists that would justify the denial of a Hinshaw exemption to the Green System East.

The Government also advances the factual argument that a Hinshaw exemption does not lie because gas purchased by United from independent producers within Louisiana "is then transported in United's certificated interstate facilities before a portion of it is diverted for introduction into the Green System." In its Petition LGS has already pointed out the incontrovertible fact that:

> "Most of the gas contended to be injected into the Green System is said to come at Points I and J. At both points United takes gas at the tailgates of process plants (owned by Getty Oil at Point I and Humble at Point J) and runs the gas through about 93' of valves and meters, before splitting the gas into two streams, one of which goes to the interstate Black System and the other to the Green System." (LGS 10.)

It illustrated this fact by reproduction of a flow diagram of the situation at Point I at page A-98 of its Petition, which is reproduced as Appendix A herein. LGS submits that the factual assertion made by the Government quoted hereinabove cannot be sustained in the face of the diagram reproduced as Appendix A. The Government has failed to establish any possible refutation of the objections against its factual assertions. But the mere fact that the Government has deemed it necessary to go into these questions of fact constitutes a tacit admission that this matter is not one that should be disposed of without review by this Court.

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APPENDIX A

EXHIBIT 29

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IN THE

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Respondent.

REPLY OF STATE OF LOUISIANA AND ALLIED PETITIONERS TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1973

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AND LOUISIANA PUBLIC SERVICE COMMISSION,

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Respondent.

REPLY OF STATE OF LOUISIANA AND ALLIED PETITIONERS TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opposing briefs demonstrate that the Federal Power Commission (FPC) is seeking to usurp the jurisdiction of the states to regulate local operations of intrastate gas pipelines. Such briefs ignore the basic and far-reaching issues worthy of review by this Court, fail to defend the rationale underlying the decision of the Court of Appeals and deal in detail, with the merits, of subsidiary issues. Instead, the opposing parties have presented new arguments to which this reply is addressed.

1. Louisiana[1] urges the granting of certiorari because the oppositions of the FPC and United Gas Pipe Line Company (United[2]) utterly fail to address, or rebut, its contention that the issues presented by this proceeding are of exceptional importance and first impression and that the decision below will aggravate the present nationwide shortage of all fossil fuels (LA 11-13, 22). Thus, they do not deny that affirmance of the decision below will prevent common use of gas supplies and facilities by interstate and intrastate lines, prohibit exchanges of gas between them and permit any intrastate line to unilaterally void, at will, its contractual obligations to producers and consumers. Surely, United's reference (UN 9, n. 16) to New York's earlier support of the FPC below is not responsive to our specific arguments and, in any event, that single state does not represent, as United mistakenly claims, the "eastern consumer interests." New York certainly does not represent the five producing states, the major independent producers or United's customers seeking certiorari here.

2. All parties agree that federal jurisdiction over the facilities and operation of natural gas pipelines depends upon a physical movement of gas across state lines (i.e. the "channel of constant flow test of *Lo-Vaca*[3] and *Amerada*[4]). Since no such flow occurs in Green East the FPC (p. 12) and United (p. 8) urge that the relevant channel is that

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[1]Referred to in citations to Petition for Certiorari as "LA."

[2]Referred to in citations to Brief Opposing Certiorari as "UN."

[3]*California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366.

[4]*Federal Power Commission* v. *Amerada Petroleum Co.* 379 U.S. 687.

of the lines in which "interstate" gas produced in Louisiana flows to other states before injection in the local Green East facilities. But, the Act defines FPC jurisdiction solely in terms of interstate sales and transportation,[5] and natural gas has neither an interstate nor intrastate character. Under the Act, the FPC has jurisdiction only over the sale or transportation at the point where interstate facilities deliver gas to local facilities, but under the nonstatutory concept of "interstate gas," the agency's jurisdiction would include *all* subsequent sales made either from the intrastate line which receives such gas or from any other intrastate line connected thereto at any single point. Thus, the FPC has fully confirmed our claim that state jurisdiction over intrastate pipelines serving only local consumers would be lost unless there is a complete isolation of each and every facility of such lines from any interconnections or exchanges with gas produced within the state of consumption which is commingled with other such local gas destined to other states (LA 17).

3. No party disputes Louisiana's assertion that continued intrastate status for the Green and Purple facilities will not adversely affect interstate consumers served by United (LA18-19). Thus, United's claim (12-13) that curtailment problems cannot be solved by the FPC controlling deliveries at the point of interconnection between its interstate and intrastate facilities concerns only the ability of the State of Louisiana to protect its own human needs gas consumers. But, service to such local consumers is admittedly[6] beyond FPC jurisdiction, under the Section 1(b) exemption of "local distribution of natural gas."

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[5]Section 1 (b). *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516.

[6]*United Gas Pipe Line Co.*, 46 FPC 786, 807 (1971).

4. United assumes, contrary to fact, that if the Green and Purple facilities are Hinshawed human needs customers in Louisiana will suffer (UN 13). But, no party has either denied or rebutted our claim that the contractual provisions under which United curtailed its local customers long before the FPC assumed jurisdiction give the highest priority to residential and commercial consumers of gas (LA 18). In any event, they grossly misread the provisions of Louisiana's Constitution which provides:

> "*The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered* by the common carriers and public utilities . . .; provided, however, that the power and authority of the Commission shall not extend to any aspect of direct *sales* of natural gas . . .". (Emphasis added).

Thus, the Louisiana Commission has plenary regulatory authority over the *services* of an intrastate pipeline serving both resale and direct sale customers and has the same separate "transportation" and "sales" jurisdiction which this Court found to exist in sustaining the FPC's curtailment authority over direct sales, which were expressly excluded from the ambit of FPC jurisdiction by § 1(b) of the Act. *FPC* v. *Louisiana Power and Light Co.*, 406 U.S. 621, 641. Finally, the interpretation of this constitutional provision is the exclusive prerogative of the Louisiana Supreme Court.

This controversy has been mooted by the enactment of the Natural Resources and Energy Act of 1973 by the

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[7]Article VI, Section 4, as amended (1964).

Legislature of Louisiana[8]. That Act applies to intrastate pipelines or Hinshawed pipelines[9] and authorizes the Commissioner, upon the declaration of an emergency gas shortage by the Governor,[10] to order any such pipeline to curtail in accordance with priorities which give the highest priority to human needs[11] subject to certain limitations upon the volumes of gas thus reallocated[12] which do not apply to contracts executed after the Act.[13]

5. The FPC (16, n. 11) seeks to rewrite § 1 (c) which makes conclusive a certification from the state commission that it has "regulatory jurisdiction over rates and services"[14], by requiring that State jurisdiction over direct sales be coextensive with Federal jurisdiction. This will enable it to emasculate the effectiveness of the Congressional exemption of pipeline operations of local concern from Federal regulation.

6. The "another person" requirement does not bar a § 1 (c) exemption (FPC 13-15, UN 14) since neither United nor the FPC deny or rebut our arguments that Green-East and Green-West facilities must be separately considered, for

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[8] Louisiana Revised Statutes of 1950, Title 30, Chapter 7. Ten certified copies have been filed with the Clerk for distribution.

[9] § 503 (4), (5) and (6).

[10] § 571.

[11] §572 specifies a predetermined set of priorities to be implemented immediately which the Commissioner may alter by order under § 574 B.

[12] § 575.1 limits reductions on deliveries ordered by the Commissioner to 10% of maximum daily contract quantities or, in the case of gas purchased in the field by an ultimate consumer transporting through his own pipeline, to 25,000 Mcf per day.

[13] *Id.*

[14] Opinion 610 (Jt. App. 48a) acknowledged that the Louisiana Commission has made such a certification.

Hinshaw purposes, and that deliveries to the East facilities at the tailgate of extraction plants are made by independent producers, not by United (LA 6, 16, 20). The FPC misstates the facts of record in claiming (15-16) that the gas exchanged by the Purple facilities is received from United. For, as the Court of Appeals found (Jt. App. 25a-26a), the exchange at each point is with *another* interstate pipeline and at Point H (the only other point where interstate gas flows) gas is delivered by *independent producers*.

7. The FPC's theory (16) that the Purple facilities are not eligible under § 1 (c) because gas is exchanged with interstate lines is inconsistent with its action in certificating such an exchange in *Michigan Consolidated Gas Co., et al.*, 46 FPC 658, while preserving the exempt status of the local line. And, contrary to the FPC's claim (Id), the Court made *no* findings on the eligibility of the Purple facilities for a § 1 (c) exemption since its recital of out-of-state gas flows was made in finding FPC jurisdiction over such facilities (Jt. App. 25a), which Louisiana concedes.

8. The FPC's argument (15-16) that the Green East and Purple facilities fail to meet the § 1 (c) requirement that all gas received from another person be consumed within the State imposes a test which is impossible to meet. It contends that since only a part of the commingled interstate and intrastate gas stream is injected into, and consumed within, the local facilities, the remainder is consumed outside Louisiana. But this is true of every interstate line serving more that one state and a line serving only a single state is *intrastate* and does not require the exemption.

CONCLUSION

Louisiana's petition for writ of certiorari should be granted.

Respectfully submitted,

STATE OF LOUISIANA,
LOUISIANA
MUNICIPAL ASSOCIATION AND
LOUISIANA PUBLIC SERVICE
COMMISSION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-872

STATE OF LOUISIANA,
LOUISIANA MUNICIPAL ASSOCIATION
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Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION OF STATE OF LOUISIANA AND ALLIED PETITIONERS FOR REHEARING

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PETITION OF STATE OF LOUISIANA AND ALLIED PETITIONERS FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered April 29, 1974, and (2) granting the petition. As grounds for this motion, petitioners state as follows:

There are intervening circumstances of substantial or controlling effect which warrant rehearing by this Court of its denial of certiorari in this proceeding on April 29, 1974.[1] The

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[1] *Massey v. United States*, 291 U.S. 608.

Federal Power Commission (FPC) opposed certiorari review here on the ground, *inter alia*, that a so-called Hinshaw Amendment exemption under §1(c) of the Natural Gas Act could not lawfully be granted unless the state in which a pipeline, whose operations are primarily of local concern, is situated regulates all aspects of its direct industrial sales to the same extent as they would be regulated by this federal agency. This Court's consideration and disposition of this case was in the context of its express holding [2] that Louisiana's Constitution prohibited its state Public Service Commission from regulating any aspect of the sales of natural gas to direct industrial users. However, on April 20, 1974, the citizens of Louisiana approved a new Constitution which removes this prohibition and takes effect on December 31, 1974.[3]

The denial of certiorari here, in the light of the intervening circumstances of the removal of the preexisting Constitutional impediment to state regulation of direct industrial sales, will leave the status of scores of Hinshawed pipelines in a state of uncertainty which will have grave and material adverse consequences to the national interest. This Court's denial of certiorari, coupled with the novel and broad rationale advanced by the FPC [4] and United,[5] makes it impossible for the owners and operators of currently Hinshawed local pipelines operating in the 36 states which do not regulate direct industrial sales to the same extent as the FPC [6] to determine whether their exemptions will be revoked and makes it equally

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[2] *FPC v. Louisiana Power and Light Company*, 406 U.S. 621, 633.

[3] Proposed Constitution of the State of Louisiana, reprinted in the *State Times*, Baton Rouge, Louisiana on Friday, February 22, 1974. Fifteen certified copies have this date been filed with the Clerk of the Court for distribution.

[4] Opposition to Certiorari, p. 16, n. 11.

[5] Opposition to Certiorari, p. 13.

[6] "Federal and State Commission Jurisdiction and Regulation, Electric, Gas and Telephone Utilities" (1967) published by the Federal Power Commission.

impossible for the legislatures of these states to determine whether an amendment of their state statutes will be effective to preserve the local control they now exercise over such pipelines. Worse still, neither independent producers nor intrastate pipelines nor state or federal regulatory bodies can operate and plan rationally in this climate of uncertainty. Yet the current acute and clearly longlasting shortages of all forms of fossil fuels in the United States is of crisis dimensions and imperatively requires, in the national interest, that this uncertainty be clearly eliminated as soon as possible.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the Order of Denial, vacate that Order, grant the petition and review the judgement and opinion below.

Respectfully submitted,

STATE OF LOUISIANA, LOUISIANA MUNICIPAL ASSOCIATION AND LOUISIANA PUBLIC SERVICE COMMISSION

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Their Attorney

May, 1974

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ Arnold D. Berkeley
Counsel for Petitioner